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MILITARY LAW REVIEW

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In memoriam
Judge Peter Hollingshead-Cook

IN MEMORIAM:

Peter Hollingshead-Cook,
Appellate Military Judge,
U.S. Army Court of Military Review,
1 July 1975–15 August 1978

Colonel Peter Hollingshead-Cook, Senior and Associate Judge, United States Army Court of Military Review, died on 15 August 1978, while on leave in Cuernavaca, Mexico. Judge Cook is survived by his widow, Light, and two sons, Steven and Peter.

Judge Cook had a distinguished career as a soldier and military lawyer before coming to the Court. He was born in New York and educated at the University of Virginia where he received his Bachelor of Laws Degree in 1956. He was a member of the bar of the Commonwealth of Virginia.

His military career began in 1944 with service as an enlisted man. His extensive military education included completion of the Officer Candidate Course at The Infantry School, the Basic and Advanced Courses at The Judge Advocate General's School, and the Regular Course at the Command and General Staff College.

Throughout his military service he served in many important assignments with great distinction, including the positions of Staff Judge Advocate, V Corps in Germany, Staff Judge Advocate, 2d Infantry Division in Korea, Deputy Staff Judge Advocate, Sixth United States Army, and several positions in the Office of The Judge Advocate General and The Judge Advocate General's School.

He earned numerous military awards and decorations for his exceptional service, including two awards of the Legion of Merit, two awards of the Meritorious Service Medal and three awards of the Army Commendation Medal.

Judge Cook was an avid reader, a prodigious writer, and a dedicated legal scholar. His opinions consistently demonstrated his deep concern for human values and the rights of individuals, within the protection of the Bill of Rights of the Constitution, and in the best

traditions of Jefferson and Holmes. Once having adopted a position on a legal issue, he tenaciously held to his point of view. But when his intellectual honesty recognized the wisdom of and the need for a change, his opinions reflected his new views and his reasons therefor.

Judge Cook's outstanding contribution to the body of law for the military services is a matter of record in his many published decisions.

His untimely departure from the Court created an immeasurable loss for his associates and all who knew him.

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Clerk

A CRIMINAL LAW SYMPOSIUM:

INTRODUCTION

The area of military law which has been undergoing the most rapid and extensive changes in recent years is, without doubt, criminal law. Because of this, it is difficult to publish even one article, not to mention a symposium, on the subject. Preparation time for an issue of the *Military Law Review* is long enough that articles are not infrequently rendered out of date by decisions of the Court of Military Appeals before they can be published. It is therefore a source of special satisfaction for the *Review* to present this collection of articles on military justice.

Though an occasion for sadness, it is also very fitting that this issue should open with a eulogy for Judge Peter Hollingshead-Cook, who devoted the greater part of his professional life to criminal law matters.

The first substantive item is Captain Pavlick's article on extraordinary writs and the military courts. He focuses on the exercise by the Court of Military Appeals of powers under the All Writs Act, especially the granting of relief in aid of jurisdiction. Also considered is the court's assertion of broad supervisory powers in the *McPhail* case. Captain Pavlick discusses the relationship between the chain of command and the military courts, and concludes that the Court of Military Appeals has not yet developed a unified legal theory out of the cases decided by it in this area.

Major Cooper has contributed an article which discusses the relationship between military criminal law and the various sixth amendment guarantees concerning jury trials, witness confrontation, counsel, and the like. He concludes that military accused before courts-martial enjoy the full range of sixth amendment rights, except for trial by jury in the traditional sense of the phrase.

The third substantive article in this issue also deals with constitutional law. Mr. Gerald P. McAlinn is author of an article discussing a Vietnam era case, *Culver v. Secretary of the Air Force*. Culver was an Air Force JAGC captain who was court-martialed for participating in a demonstration in London in violation of an Air Force

regulation. Federal civilian courts upheld the constitutionality of the regulation. Mr. McAlinn discusses the correctness and implications of the court decisions. He concludes that the *Culver* decision represents a departure from precedent.

While this article deals primarily with an administrative law topic, first amendment freedom of expression, it also concerns the authority of the military services to subject military personnel to trial by court-martial for offenses affecting the political neutrality of the services.

This issue also includes two book reviews. Captain Schlueter reviews a commercial edition of the rules of the Court of Military Appeals. The Editor examines the three-volume work, *Forensic Medicine*.

PERCIVAL D. PARK
Major, JAGC
Editor, *Military Law Review*

EXTRAORDINARY WRITS IN THE MILITARY JUSTICE SYSTEM: A DIFFERENT PERSPECTIVE*

by Captain John J. Pavlick, Jr.**

In this article, Captain Pavlick reviews the historical process through which the Court of Military Appeals has asserted and exercised the powers of the All Writs Act, 28 U.S.C. § 1651(a) (1976). He examines at length the current status of the court's views concerning its writ power. Emphasis is placed on the court's granting of relief in aid of its jurisdiction, and on the assertion by the court of broad supervisory powers in the case of McPhail v. United States, 1 M.J. 457 (1976).

Captain Pavlick also mentions briefly the similar development of writ powers in the hands of the various service courts of military review.

The author discusses some of the strengths and weaknesses of the position of the Court of Military Appeals in relation to the military chain of command, which has its own powers to grant relief, and its own obligation to uphold the integrity of the system. Captain Pavlick concludes that the court has not yet developed a unified legal theory from the many cases decided by it in this area.

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

**JAGC, United States Army. Chief, Defense Counsel Section, Office of the Staff Judge Advocate, Headquarters, 1st Infantry Division and Fort Riley, Fort Riley, Kansas, since October 1978. Graduate of the Judge Advocate Officer Basic Course, J.A.G. School, Charlottesville, Virginia, 1978. B.S., 1970, United States Military Academy; J.D., 1978, University of Pennsylvania Law School. Member of the Bar of Pennsylvania.

I. THE UNDERLYING PROBLEM

The extraordinary writ power has been the subject of much debate and controversy outside the military community as well as within it. This dispute has increased in the wake of a decision of the United States Court of Military Appeals, *McPhail v. United States*,[1] wherein the court stated that it had broad powers in its supervisory role to issue extraordinary writs throughout the military system. Several civilian commentators have viewed this decision as a foundation for broad changes and future exercises of power.[2] Unfortunately, they, like many observers inside the military, look only to CMA and do not take into account the interaction with the military power structure within the military society. Essential to a complete understanding of the exercise of the writ

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[1] 1 M.J. 457, 24 C.M.A. 304, 52 C.M.R. 15 (1976).

Hereinafter the United States Court of Military Appeals will be referred to in both text and notes as "CMA."

This volume of the *Military Law Review* is the last in which the triple citation form, illustrated above, will be used.

The last bound volume of the old official reporter, *Decisions of the United States Court of Military Appeals* (C.M.A., or U.S.C.M.A.) was volume 21, published in 1972. Starting with volume 22, the C.M.A. reporter was merged with the *Court-Martial Reports* (C.M.R.). References to cases in 22 and 23 C.M.A. appear in volumes 46 through 50 of the C.M.R., but these two "volumes" were never published as such. During the transition from the *Court-Martial Reports* to the new *Military Justice Reporter*, citations to 24 and 25 C.M.A. were occasionally found, but these never existed except as advance sheets.

The last bound volume of *Court-Martial Reports* (C.M.R.) was volume 50, published in 1975. For a time after the publication of that volume, citations to 51, 52, and 54 C.M.R. were found, but these were only advance sheets. Volume 53, tentatively reserved for certain court of military review decisions issued between July of 1975 and November of 1976, was never published in any form.

The *Military Justice Reporter* (M.J.) began publication in 1978 as successor to the *Court-Martial Reports* and the *Decisions of the United States Court of Military Appeals*. It replaced all the C.M.R. and C.M.A. advance sheets, and 1 M.J. reported Court of Military Appeals decisions which also appear in 50 C.M.R. Except for the overlap between 50 C.M.R. and 1 M.J., cases reported in the *Military Justice Reporter* will be cited only to that reporter in future issues of the *Military Law Review*.

[2] Willis, *The United States Court of Military Appeals—"Born Again,"* 52 Ind. L. J. 15 (1976); Note, *Building a System of Military Justice Through the All Writs Act*, 52 Ind. L. J. 189 (1976).

power is an approach which recognizes at all levels the constant tension between two sources of power within the system.

This basic tension exists between, on the one hand, the scheme of statutory powers granted to the chain of command[3] and CMA by the Uniform Code of Military Justice,[4] and, on the other, the general role of CMA as the supreme court in the military justice system. This statutory scheme gives tremendous power over the administration of military justice to the convening authority during every phase of the court-martial procedure and initial post-trial review.[5] These powers, coupled with the complete control of the chain of command over all personnel operations of the armed forces, results in a pervasive influence on all aspects of the military system.[6]

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[3]Throughout this article, references will be made to various portions of the military structure. As used in this article, the terms "chain of command" and "military authorities" will denote not only the individual commanders but also their staff collectively. Thus, discussion of actions taken at any particular level of command will assume that the commander and his legal staff act as one. Admittedly this assumption becomes somewhat less credible in the upper levels of the military power structure, but any distortion should not materially affect the discussion.

The commander most crucial in the military judicial process is the convening authority. That official exercises control over referral of a case to trial, and has great influence over the procedural and administrative aspects of the court-martial. Moreover, he or she takes an active role in the initial review of the court-martial conviction and sentence. At this level, the assumption probably conforms most closely with reality: As a practical matter, the convening authority and his or her staff judge advocate section should be considered as one.

[4]10 U.S.C. §§ 801–940 (1976) [hereinafter cited as U.C.M.J. or the Code in text, and U.C.M.J. in footnotes]. Note that the last two digits of the United States Code sections correspond with the last two digits of the U.C.M.J. articles. Thus, 10 U.S.C. § 866 becomes U.C.M.J. article 66, and 10 U.S.C. § 934 becomes U.C.M.J. article 134.

[5]*See* Sherman, *Military Justice Without Military Control*, 82 Yale L. J. 1398, 1399 n.7 (1973). *See also* West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. Rev. 1 (1970).

West used his article in part as the basis for a book entitled *They Call It Justice*, sharply criticized by Captain Brian Price in his review published at 78 Mil. L. Rev. 184 (1978).

[6]A recent government report focuses on the power of the convening authority to influence the court-martial process. General Accounting Office, FPCD–78–16, Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System (Oct. 31, 1978).

While the GAO report noted that the U.C.M.J. specifically prohibits commanders from utilizing their power to so influence courts-martial, the potential to do is

A military judicial system is established by the Uniform Code; but to a large degree the power and effectiveness of this system is dependent upon the leadership and force of CMA. The status of CMA is often alluded to by members of Congress, the Supreme Court, and CMA itself in very broad and impressive terms,[7] which suggest plenary power within the military system. However, as former Chief Judge Quinn[8] had come to realize, Congress did not provide adequate statutory powers for the court to carry out these broad mandates.

The court has jurisdiction to review only a relatively small percentage of the courts-martial,[9] and its powers are very austerely and often ambiguously stated.[10] This statutory deficiency is likewise true of the powers of the four courts of military review and the military trial judges, who comprise the remainder of the military judicial structure.[11] This statutory deficiency becomes even more

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definitely present. The report found some cases of abuse of this power, but did not find widespread improper influence. Even so, the perception of the existence of this power coupled with the potential for abuse was sufficient basis for the GAO to recommend to Congress a major modification of the military justice system to reduce the power of, and therefor the possibilities for exercise of improper influence by, the convening authority.

[7] *See* McPhail v. United States, 1 M.J. 457, 461–62, 24 C.M.A. 304, 308–09, 52 C.M.R. 15, 19–20 (1976). For statements of members of Congress, *see, e.g.*, 95 Cong. Rec. 5726 (1949).

[8] Petty v. Moriarty, 20 C.M.A. 438, 443, 43 C.M.R. 278, 284 (1971) (dissenting opinion).

[9] Under U.C.M.J. art 67(b), C.M.A. can review only cases which have been reviewed by a court of military review under art. 66(b). That article allows review of a court-martial only in cases "of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more."

Although review is normally based on sentence or status, U.C.M.J. art. 69 authorizes the Judge Advocate General to certify any general court-martial to the Court of Military Review and then to CMA. Although in theory any general court-martial could be reviewed by CMA, it is used primarily to appeal decisions adverse to the Government. *See generally*, Mummey, *Judicial Limitations Upon a Statutory Right: The Power of the Judge Advocate General to Certify Under Article 67(b)(2)*, 12 Mil. L. Rev. 193 (1961). This power may be of importance in the case of an extraordinary writ based on potential jurisdiction.

[10] *See, e.g.*, U.C.M.J. arts. 67(f) and 73.

[11] *See, e.g.*, U.C.M.J. art. 66. Do the courts of military review have powers separate from those of the branch judge advocate general? *See* Combest v. Bender, 43 C.M.R. 899 (C.G.C.M.R. 1971). *See also* McHardy, *Military Contempt Law and Procedure*, 55 Mil. L. Rev. 131 (1972), for discussion of the limited contempt power of the military judge.

glaring when one considers that the prime reason for a supreme military court comprised of civilians was to offset and control the power of the military authorities. Additionally, even where the UCMJ provides general rights and procedures, the implementing regulations which flesh out these rights are promulgated by the President and the very military authorities that the court is supposed to control.

These statutory deficiencies create power vacuums where either side may claim powers. This presents a special problem for CMA in that it often has very little in the way of explicit authority for moving into an area and asserting authority. Also as a practical matter its decisions are not always based on statutes but often involve interpretations of constitutional doctrines and its own interpretations of Code provisions.

CMA's initial assertions of power met with strong and rather bitter resistance from the military establishment and culminated in the so-called Powell Report,[12] prepared by senior Army generals. This report criticized the court's actions and called for limitations on its powers, and for reversal of many of the court's decisions. Following this report, which resulted in no Congressional response, the conflict became low-keyed, although as late as 1971 the philosophy of the Powell Report was embraced by the then Army Chief of Staff, General Westmoreland.[13]

Recently CMA has received resistance and pressure from yet another area, as both the General Counsel of the Department of Defense and a leading senator have urged that CMA's ultimate review authority for military cases be shifted to the Fourth Circuit Court of Appeals with review by the United States Supreme Court.[14] Thus, the tension has risen to the surface once more and continues to be present whenever CMA acts to assert power, exer-

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[12] Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army, Report to Hon. Wilbur M. Brucker, Secretary of the Army (Jan. 18, 1960) [hereinafter cited as the Powell Report].

[13] Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 Am. Crim. L. Rev. 5 (1971).

[14] In March 1978, Deanne C. Siemer, the General Counsel of the Department of Defense, outlined this plan in a speech in Hawaii. Two of the C.M.A. judges were

cise authority, or interpret principles not specifically covered by the UCMJ.

The current CMA tends to bring this tension to the surface due to its widely acclaimed judicial activism.[15] Specifically, the current court's goal appears to be a reduction in the power and influence of the convening authority over the judicial process and a concurrent increase in the authority of the military courts.[16] Particularly important to achieving its goal is the use of extraordinary writs under the All Writs Act. By their very nature their exercise will aggravate the situation. The authority that CMA is invoking is a general statute which is not peculiar to military law and whose exact scope is uncertain even in the federal sector. Most importantly, as utilized in the military context, it is aimed primarily at the convening authority.

This article will outline the gradual evolution of the assertion of extraordinary writ power by CMA, the current interpretation of its scope, and how this comports with CMA's view of its role. Particular attention will be placed on the doctrinal basis for CMA's concept of its authority and how this affects possible limitations on the future exercise of the power. Finally, CMA's use of the writ power will be explored as a function of judicial power within the military justice system in the context of increased resistance by the military authorities and CMA's inherent weaknesses.

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in the audience. Her initial proposal called not only for the shifting of the review power but also for the abolition of C.M.A. as such.

The bill introduced by Senator Strom Thurmond (R-S.C.)—S. 1353, 95th Cong., 2d Sess. (1975)—would allow C.M.A. to exist, but would allow further appeal by either party to the United States Court of Appeals for the Fourth Circuit, sitting in Richmond, Virginia. The bill also envisions that, as in any other court of appeals case, the decision may ultimately be reviewed by the Supreme Court. When introduced, the bill was favorably reported by the Senate Subcommittee on Improvements in the Judicial Machinery in mid-July 1978, and was sent to the full Senate Judiciary Committee. Army Times, Aug. 7, 1978, at 6, col. 1.

[15] *See generally* Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43 (1977). This is an outstanding and exhaustive study of the current CMA and its attempts to change the military justice system.

[16] *Id.*

II. A SHORT HISTORY OF HOW THE ALL WRITS ACT HAS BEEN APPLIED TO CMA

The current version of the All Writs Act is the source of authority for several types of supervisory writs and reads in pertinent part, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[17]

There are three crucial portions of this Act, only two of which have been the source of much controversy in the military context. Whether it was a court established by act of Congress was the fundamental question initially faced by CMA. Although this issue was hotly contested in the early history of CMA, it has now been definitely established that it is a court established by act of Congress,[18] and that even though it is an Article I court, the act is applicable.[19]

The reach and interpretation of the second portion, "in aid of jurisdiction," has developed into the greatest source of controversy both in the federal court system and in the military. It is the primary unsettling factor in CMA's current exercise of the writ power. The critical point about this requirement is that it has been interpreted as not an independent grant of jurisdiction but as an explicit recognition of ancillary powers dependent upon preexisting jurisdiction.[20]

The last and least controversial aspect of the Act, "agreeable to the usages and principles of law," has spawned several prerequisites which must be met before a writ will issue. While initially construed as nothing more than embodiment of traditional common law writ practices,[21] in the military context CMA has developed it

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[17] 28 U.S.C. § 1651(a) (1976).

[18] This status was clarified by Congress when it enacted the 1968 amendments to the U.C.M.J. and definitely stated CMA's status in the new Article 67.

[19] U.S. Const. art. I, § 9, cl. 14.

[20] United States v. Morgan, 346 U.S. 502 (1954); Banker's Life and Casualty Co. v. Holland, 346 U.S. 379 (1953).

[21] United States v. Hayman, 342 U.S. 205 (1952).

into a definition of extraordinary circumstances and a requirement of exhaustion of available remedies.[22]

The initial approach of CMA to the All Writs Act belied its uncertainty as to its status as a court established by act of Congress.[23] The subject of possible applicability was first broached in *United States v. Best*,[24] where the court obliquely referred to possible extraordinary proceedings while citing a case construing the All Writs Act, *United States v. Morgan*[25] Throughout the 1950's and the beginning of the 1960's, CMA hinted at its status and power under the act to issue extraordinary writs but never found that the circumstances warranted the issuance of a writ.[26]

CMA squarely faced the problem in 1966 when it clearly stated in *United States v. Frischholz*[27] that it was a court established by act of Congress within the contemplation of the All Writs Act. In quick succession CMA moved to reaffirm this assertion and delineate areas where it would act if the situation warranted a writ.[28] However, it was not until the 1968 case of *Jones v. Ignatius*[29] that CMA actually granted some form of relief. Subsequent to this, CMA granted relief in several other cases,[30] but this was the exception

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[22] H. Moyer, Justice and the Military § 2–835 (1972).

[23] The original title of CMA was merely the Court of Military Appeals. Even though the court used the title United States Court of Military Appeals when referring to itself, this title was not made official until the 1968 Amendments to U.C.M.J. art. 67. Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335 (1968).

[24] 4 C.M.A. 581, 585, 16 C.M.R. 155, 159 (1954).

[25] 346 U.S. 502 (1954).

[26] In re Taylor, 12 C.M.A. 427, 31 C.M.R. 13 (1961); United States v. Taveres, 10 C.M.A. 282, 27 C.M.R. 356 (1959); United States v. Buck, 9 C.M.A. 290, 26 C.M.R. 70 (1958).

[27] 16 C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966).

[28] Hallinan v. Lamont, 18 C.M.A. 652 (1968); Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967); Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967).

[29] 18 C.M.A. 7, 39 C.M.R. 7 (1968).

[30] Fleiner v. Koch, 19 C.M.A. 630 (1969); United States v. Jackson, 17 C.M.A. 681 (1968).

rather than the rule; and the court seemed satisfied to merely define the limits of its authority.

One of the cases where CMA granted relief is noteworthy because in it the Government implicitly recognized this power by petitioning for a writ of mandamus directed at several Army courts of military review.[31] With this, CMA's authority to issue writs under the act was almost universally accepted, at least where the court could ultimately review the case. However, the number of cases which the court could review under UCMJ Article 67 is very limited, and the vast majority of the cases lay outside the purview of CMA's writ power.[32] This restriction was thought to be required by the federal court interpretation that there must already be an independent source of jurisdiction.

Buoyed by its success and by the acceptance of its actions, CMA asserted a much broader power in *United States v. Bevilacqua*.[33] In that case the court stated that it was "not powerless to accord relief to an accused who has palpably been denied his constitutional rights in any court-martial."[34] By this holding, CMA cast off the restraints of limited review under UCMJ Article 67 and enlarged its authority to encompass every court-martial, regardless of the sentence adjudged. It should be noted that the opinion of the court shows no real attempt at analysis of the problem, no analogy to the federal system, and no overall theory of why this assertion was necessary, all resulting in a very weak doctrinal basis.

This broad assertion was shortlived, however, lasting no more than nine months until the court drastically narrowed its holding in *Bevilacqua*. *United States v. Snyder*[35] did not explicitly overrule *Bevilacqua*, but it essentially vitiated the broad assertion and reaf-

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[31] In United States v. Boards of Review Nos. 2, 1, 4, 17 C.M.A. 150, 37 C.M.R. 414 (1967), the Army Judge Advocate General petitioned CMA for a writ of mandamus commanding the named Boards (later Courts) of Review to adhere to a prior CMA decision, United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[32] *See* note 9 *supra*.

[33] 18 C.M.A. 10, 39 C.M.R. 10 (1968).

[34] *Id.*, at 39 C.M.R. 11–12.

[35] 18 C.M.A. 480, 40 C.M.R. 192 (1969).

firmed that its power to issue writs under the act was conditioned on potential or actual jurisdiction over the case on normal review.

This quick retreat was occasioned by a discouraging remark by the Supreme Court in *Noyd v. Bond.*[36] In an earlier case, *United States v. Augenblick*,[37] the Supreme Court had implicitly acknowledged the power of CMA to issue extraordinary writs and had cited *Bevilacqua* without comment. The Supreme Court in *Noyd* explicitly acknowledged that CMA had authority to issue extraordinary writs in cases which it ultimately could review.[38] However, the opinion went on to state that it would be an entirely different matter if CMA were not authorized to review the case under existing statutes, citing *Bevilacqua* with implicit disapproval.[39] Apparently, this footnote dictum was enough to persuade CMA to completely reverse its stance and retreat from this broad assertion of power.

During the period of time from the *Snyder* decision in 1969 until the *McPhail* decision in 1976, CMA made no major changes in its interpretation of what was "in aid of its jurisdiction." But to say this is not to imply that CMA was dormant in the area of extraordinary writs. During this time several significant developments occurred, each to have its own effect upon the writ policy.

Starting in 1970, a debate sprang up between the different courts of military review as to whether they were courts established by Act of Congress and, therefore, possessed of writ powers under the All Writs Act. The Army Court of Military Review, en banc, stated in *United States v. Draughon*[40] that it was a court within the meaning of the Act and that it had the power to grant extraordinary relief. The Air Force Court of Military Review agreed a short time

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[36] 395 U.S. 683, 695 n. 7 (1969).

[37] 393 U.S. 348 (1969).

[38] 395 U.S. at 695 n. 7.

[39] *Id.*

[40] 42 C.M.R. 447 (A.C.M.R. 1970). U.C.M.J. art 66 states, "each Judge Advocate General *shall establish* a Court of Military Review . . . . " The court read this language as a command from Congress, and concluded that courts of military review are established by Act of Congress. The Court also found the writ power to be an inherent part of the power of any appellate court.

later,[41] but a third court of review, that of the Coast Guard, vehemently disagreed.[42]

What is of real interest is that CMA agreed with the Army court. In 1975 in *Kelly v. United States*,[43] CMA remanded a petition for extraordinary relief to the Army Court of Military Review in order for it to exercise its own writ powers. While the soundness of this decision is beyond the scope of this discussion, this order would at least act to increase the number of judicial bodies able to grant relief.

Subsequent to *McPhail* and *Kelly*, the Army, Navy, and Air Force courts have each granted some sort of extraordinary relief, albeit with varying degrees of reluctance.[44] However, due partially

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[41] Gagnon v. United States, 42 C.M.R. 1035 (A.F.C.M.R. 1970) (citing Draughon and Frischholz).
[42] Combest v. Bender, 43 C.M.R. 899 (C.G.C.M.R. 1971). This decision emphasizes control by The Judge Advocate General and the resultant lack of independence of the judges.
[43] 23 C.M.A. 567, 50 C.M.R. 786 (1975).

[44] The Army Court of Military Review has entertained more writs and granted more relief than the other C.M.R.'s. However, this is deceiving because it only exercised this power once on direct petition. United States v. Montcalm, 3 M.J. 787 (A.C.M.R. 1976).

While the precedent of independently granting relief is significant, its manner of exercise leaves some questions unanswered. The court in Montcalm issued a writ of error coram nobis. Functionally, such a writ allows an appellate court to reconsider a prior decision. Issuance of this writ is based upon exceptional circumstances not apparent to the court when it initially decided the case. This writ is by its nature passive and does not force the court to order any court or person under its jurisdiction to do anything.

In *Montcalm* itself the court found that the exceptional circumstance was an intervening C.M.A. decision, United States v. Holland, 23 C.M.A. 442, 50 C.M.R. 461, 1 M.J. 58 (1975). In *Holland*, the same type of pretrial agreement used in *Montcalm* was struck down. Thus *Montcalm* can be viewed as merely a retroactive application of *Holland*.

Quite apart from whether the A.C.M.R. will actively exercise its power and authority is the question of its authority to issue the writs. From the initial assertion of authority in *Draughon*, the A.C.M.R. has apparently embraced two different theories simultaneously. According to the first, it is a court under the All Writs Act. Second, the power to issue these writs is an inherent part of the powers of any appellant court.

While the second theory seems to fit nicely writs of error coram nobis, it is unanswered whether this theory will form a basis to issue *all* writs traditionally

to the small number of decisions, the long term impact of the exercise of this power by the courts of review is uncertain.

Although the court did not make any drastic assertions, prior to 1975 it did extend its authority definitely into the area of the convening authority's decisions to confine individuals either during the pretrial stage[45] or the post-trial period.[46] One case in the latter area

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authorized under the All Writs Act. Whatever the basis, the A.C.M.R., like the other courts of military review, has declined to follow C.M.A.'s lead in *McPhail* and extend its jurisdiction to all courts-martial. Barnett v. Persons, 4 M.J. 934 (A.C.M.R. 1978).

The Navy Court of Military Review has been very reluctant to exercise extraordinary writ power. It has done so only once, and then only because ordered to do so by C.M.A. United States v. Ware, 5 M.J. 685 (N.C.M.R. 1978). The Air Force Court of Military Review initially followed the Army's assertion of power. It did not exercise the power until very recently. United States v. Dettinger, 6 M.J. 505 (A.F.C.M.R. 1978).

Dettinger is perhaps the most significant Court of Military Review case. In it, the court granted a government petition for a writ of mandamus. In this extraordinary case the A.F.C.M.R. based its authority on the All Writs Act, and on its asserted inherent powers of supervision over the actions of Air Force trial judges.

The problem of the case centered upon the orders of trial judges to terminate court-martial proceedings because of failure of the convening authority to prefer the charges prior to the time requirements set forth in an Air Force manual. The court, in overruling the judges' decisions and ordering the trial court to be reconvened, relied upon United States v. Ware, 1 M.J. 282, 24 C.M.A. 102, 51 C.M.R. 275 (1976). In *Ware*, the C.M.A. held that the convening authority could not force a trial judge to reverse himself under U.C.M.J. art. 62(a). The Air Force C.M.R. viewed this decision as creating a power vacuum. Someone, the court reasoned, had to review the decisions of the trial judge, and it felt that it was better suited than C.M.A. to perform that function. 6 M.J. at 512, n.11.

While the court based its actual decision to overrule the judges on traditional supervisory writ criteria, the mere assertion of this power to entertain and grant government writs without statutory authorization is highly significant. The case has been appealed to C.M.A. 6 M.J. 161 (C.M.A. 1979). It will be very interesting to see whether C.M.A. will sanction this potentially powerful exercise of the writ power. Exercise of this type of writ would give back to the convening authority at least some of the influence lost with *Ware* and might serve to bring more pressure to bear on the trial judge. On the other hand, it is consistent with C.M.A.'s general view of the judicial system and its desire that the military judicial system closely resemble the federal court system.

[45] Horner v. Resor, 19 C.M.A. 285, 41 C.M.R. 285 (1970). Jurisdiction in cases like this one is based upon potential jurisdiction, which is the possibility that a case might be returned to a trial court of a level high enough to return a sentence allowing review.

[46] Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970).

is noteworthy because CMA granted a petition in a case in which it arguably did not have jurisdiction. In *Collier v. United States*,[47] the court found after an evidentiary hearing that a convening authority had abused his discretion in reconfining a convicted serviceman after the commander had initially granted the request for deferral of service of the sentence pending appeal.[48]

The dissent by Judge Darden is interesting both for the fact that he viewed the court as having no jurisdiction to review and hence no authority to issue a writ and also because he felt that the court was exercising a type of writ it was not authorized to use. Specifically, he thought that the type of habeas corpus exercised here was the so-called "great writ"[49] and was not the narrow type of habeas corpus authorized by the All Writs Act.[50] This confusion will appear throughout CMA's decisions and some of the Supreme Court's decisions.[51]

The most profound change, however, came in the composition of CMA. Starting in 1975, the present members of the court began to be appointed, with the current court becoming complete in February 1976 with the appointment of Judge Perry.[52] After a very short time it became clear that this new court was heading in a different direction than previous courts. Led by Chief Judge Fletcher, a definite judicial activist, they began to reexamine CMA's role in the military justice system and did not seem to feel constrained by the court's past decisions.[53] From 1975 to the present they have initiated many changes in the military justice system, one prominent example being extraordinary writs. They have attempted to shift the existing power structure within the system and have to a large degree succeeded but not without engendering resistance and increasing the tension already present. While their goals in particular areas may be unclear, their general objective is clearly to judicialize the military justice system.[54]

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[47] *Id.*
[48] U.C.M.J. art 57(d).
[49] Habeas corpus *ad subjuciendum*, 28 U.S.C. 2241.
[50] 42 C.M.R. 113, 119 (1970).
[51] Noyd v. Bond, *supra* note 36.
[52] Judge Cook was appointed in August 1974, Chief Judge Fletcher in April 1975, and Judge Perry in February 1976. Judge Ferguson was recalled from retirement in August 1974 to sit on the court during the transition. He returned to retirement upon the appointment of Judge Perry.

[53] Cooke, *supra* note 15.
[54] *Id.*

III. THE PRESENT STATUS OF THE EXTRAORDINARY WRIT POWER

A. BASIC PREREQUISITES

Generally CMA has required that three elements be present before it would exercise its extraordinary writ powers.[55] First, relief will be granted only in aid of jurisdiction; second there must be exceptional circumstances existing which render ordinary available remedies insufficient; and third, certain administrative remedies must be exhausted.

As has been discussed, the first of these is by far the most controversial and in its interpretation lies the general concept of how the writs will be used. The other two requirements, although much less controversial, have an important bearing on the use of the writ power and help shape the general nature of the relief. Specifically, these latter requirements are used by CMA as a way to filter out the great majority of petitions and thus control access to extraordinary relief. The degree of filtering is interrelated with the philosophy behind the use of the writ power and they have a definite effect on one another.[56]

The second requirement is nothing more than a definition of extraordinary circumstances and is the method by which CMA delineates where and when it will exercise this power. The writ will only be issued where there are no adequate remedies available to the individual, looking generally to appellate review but also to the military trial judge.[57] Through various decisions CMA has enumerated those areas that it feels give rise to exceptional circum-

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[55] *See* H. Moyer, *supra* note 22 at § 2-835.

[56] C.M.A.'s general use of supervisory writs is system oriented, and the court does not intend to afford relief in every case. In fact, due to the small size of the court, it could not possibly entertain and deal adequately with a large number of writs, as the court of first instance in a regular habeas corpus situation under 28 U.S.C. § 2241. Thus it must find some way to limit the number of writs with which it must deal. The filtering performed by application of these criteria for relief is extremely convenient; C.M.A. can ignore or interpret them easily to allow it to pick only the petitions it wants to entertain.

[57] Font v. Seaman, 20 C.M.A. 387, 43 C.M.R. 227 (1971), Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967).

stances.[58] Just how these situations fall within the theory governing the use of writ powers will be discussed later. For now some of the general areas will be covered.

The chief area of concern has been pre- and post-trial confinement of the serviceman by the convening authority, with the standard of review being whether there has been an abuse of discretion.[59] In the former there is normally an overriding question of jurisdiction, but once that is established, there was generally considered to be a lack of adequate relief at the appellate levels due to the time required for appeal.[60] The standards have been changed in this area with the court's decision in *Courtney v. Williams*,[61] requiring that pre-trial restraint be reviewed by a neutral and detached magistrate with his decision being subject to CMA review via extraordinary relief.[62]

In post-trial confinement appellate relief has been considered to be inadequate but for different grounds. Here the situation arises when a convicted serviceman requests a deferral of execution of sentence pending appeal, or the convening authority decides that the individual should be confined while awaiting appeal.[63] Not only is the serviceman being incarcerated during the appeal, but once the case is reviewed, there is literally no remedy for illegal confinement. This has consistently been held to be a proper subject of extraordinary writs, with the standard again being abuse of discretion.[64] Additionally, the court has granted extraordinary relief where the convening authority delayed his post-trial review[65] and

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[58] *See* H. Moyer, *supra* note 22, at § 2-837, for a good survey of the circumstances which C.M.A. has deemed exceptional enough to warrant extraordinary relief.

[59] *See* Judge Perry's discussion of the court's treatment of review of the convening authority's decisions in Corley v. Thurman, 3 M.J. 192, 194 (1977) (dissenting opinion).

[60] Horner v. Resor, 19 C.M.A. 285, 41 C.M.R. 285 (1970); Hollinan v. Lamont, 18 C.M.A. 652 (1968).
[61] 24 C.M.A. 87, 51 C.M.R. 260 (1976).
[62] Porter v. Richardson, 23 C.M.A. 704, 50 C.M.R. 910 (1975).
[63] U.C.M.J. art. 57(d).
[64] *See* Judge Perry's discussion, *supra* note 59.
[65] Thornton v. Joslyn, 47 C.M.R. 414 (1973) (convening authority ordered to authenticate record and take action pursuant to U.C.M.J. art. 60 before a certain date), Rhoades v. Haynes, 22 C.M.A. 189, 46 C.M.R. 189 (1973).

in other discretionary actions involving where and how the serviceman is to be incarcerated.[66]

The court has often liberally construed the meaning of extraordinary circumstances, especially in cases involving questions of jurisdiction. The court has found justification for extraordinary relief in cases prior to findings and sentencing at a court-martial,[67] and in *McPhail*.[68] Judge Cook admonished the petitioner for not initiating his petition at the court-martial as soon as the convening authority had acted. At the other end of the spectrum, the court has granted relief in a petition for a writ of error coram nobis where the individual had had his case reviewed by CMA, his sentence had been fully executed, he had been discharged, and military jurisdiction had terminated.[69] Reasoning that it was the only judicial body able to accord relief, CMA found exceptional circumstances, but this case appears to mark the outer limits of ability to grant relief.

The requirement for exhaustion of remedies has raised the ire of some commentators,[70] specifically as the court has required the petitioner to exercise his rights under UCMJ Article 138 to petition his commander for redress.[71] In a series of cases beginning in 1970,[72] CMA established that this remedy must be exhausted in cases of pre-trial and post-trial confinement before the court would exercise its power.

There are two evils to this policy as perceived by commentators. The primary is that it is a lengthy process; and by the time it is

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[66] *See* Whitfield v. United States, Misc. Doc. No. 78-2, 4 M.J. 289 (C.M.A. Feb. 21, 1978) (considering the nature of restraint at the United States Army Retraining Brigade, Fort Riley, Kansas); Thomas v. United States, 1 M.J. 175, 23 C.M.A. 570, 50 C.M.R. 789 (1975) (considering continued confinement in the United States Disciplinary Barracks in contravention of Army regulations and the U.C.M.J.); Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970) (considering the convening authority's decision to reconfine an accused after his release, pending completion of appellate review).

[67] Gale v. United States, 17 C.M.A. 40, 37 C.M.R. 304 (1967).

[68] *See* note 1 *supra*.

[69] Del Prado v. United States, 23 C.M.A. 132, 48 C.M.R. 749 (1974).

[70] *See* note 2 and H. Moyer, *supra* note 22, § 2-838 at 656.

[71] Catlow v. Cooksey, 21 C.M.A. 106, 44 C.M.R. 160 (1971); Font v. Seaman, 20 C.M.A. 387, 43 C.M.R. 227 (1971).

[72] Walker v. Commanding Officer, 19 C.M.A. 247, 41 C.M.R. 247 (1970); Dale v. United States, 19 C.M.A. 254, 41 C.M.R. 254 (1970).

completed, the illegal confinement issue may be moot.[73] Also, once it is complete and the commander's decision rendered, it can only be reviewed for abuse of discretion.[74] The second complaint is that it usually acts as a bar to further proceedings in the majority of cases, thus often making relief from illegal confinement impossible to obtain.[75] If this power were in the nature of traditional habeas corpus, this would be a valid attack; but within the context of writs in aid of jurisdiction, it is inapposite. As will be shown, the aim of writs under the All Writs Act is not to alleviate individual injustices; rather, the remedy is system-oriented.

Although they are usually the practical barrier to extraordinary relief, these two requirements have received very little attention. They serve, however, as a useful administrative tool of CMA to restrict the number of petitions, a critical consideration in view of the already heavy work load of the three-judge court.[76] It must be emphasized that this is a flexible standard dependent upon the discretion of the judges. As a result, they will act where they deem necessary even though these rather mechanical requirements are not met. An excellent example is a trilogy of pre-trial confinement cases decided in 1975, in which the court completely ignored the lack of exhaustion of administrative remedies to reach the merits.[77] Although it was decided before the current court was completely assembled, it might indicate a tendency not to rely so heavily on the exhaustion requirement as before. However, the present court has taken no further direct actions in this area.

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[73] *See* H. Moyer, *supra* note 22, § 2-844 at 659-60.

[74] Thus in the normal situation the right to such a remedy is illusory.

[75] *See* Note, *Building a System of Military Justice Through The All Writs Act*, 52 Ind. L. J. 189 (1976).

[76] According to the compilation of data in the Annual Reports of the United States Court of Military Appeals, the court averages approximately 150 decisions a year.

[77] Milanes-Canamero v. Richardson, 23 C.M.A. 710, 50 C.M.R. 915 (1975); Phillippy v. McLucas, 23 C.M.A. 709, 50 C.M.R. 915 (1975); Porter v. Richardson, 23 C.M.A. 704, 50 C.M.R. 910 (1975). Note that in his dissenting opinion in *Porter*, Judge Cook interpreted the majority's decision as overruling *Cooksey*, the exhaustion requirement case. The majority opinion in *Porter* did not give any justification for ignoring the requirement. Indeed, Judge Cook may be correct in his interpretation, since C.M.A. has not required—or mentioned—the Article 138 prerequisite since the *Porter* decision.

B. CMA'S CURRENT INTERPRETATION OF WHAT IS IN AID OF JURISDICTION

The most difficult theoretical problem facing CMA is interpretation of the above phrase. This is not surprising because it was also the cause of much confusion in the federal sphere, but in the military context the difficulty is compounded due to CMA's very restricted appellate jurisdiction. The treatment of this phrase goes much further than just where CMA can exercise its writ power, for the resultant supporting theory will also dictate what writs will be issued and how they will be used.

Since the initial development of the writ power in the military system, the view of *Snyder*[78] had been almost universally acknowledged as the basic definition of writ jurisdiction. The government had not only recognized the court's power to issue writs where it had potential or actual jurisdiction to review the case under the UCMJ but had petitioned the court to exercise this power.[79] Thus CMA was on solid ground when it limited the scope of its writ power to its appellate jurisdiction. This, however, allowed them to reach only a very small percentage of courts-martial and proved to be a restriction unacceptable to the present activist court.[80] Given this situation, it was not surprising when CMA threw off this restraint in *McPhail*.

Before discussing the case itself and its exact meaning, it is necessary to understand the interpretation of the "in aid of jurisdiction" requirement in the federal sphere. The development of the authority of federal courts under the All Writs Act is rather disjointed because the present version adopted in 1948 represents the merger of two distinct grants of authority.[81] One grant pertained only to the Supreme Court, granting it power to issue writs of man-

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[78] 18 C.M.A. at 482-83, 40 C.M.R. at 194-95.

[79] United States v. Boards of Review Nos. 2, 1, 4, 17 C.M.A. 150, 37 C.M.R. 414 (1967).

[80] One study has shown that C.M.A. reviews only about one percent of all courts-martial. *See* Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 Mil. L. Rev. 39, 76 n.189 (1972).

[81] *See* Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals*, 10 Harv. C.R.-C.L. L. Rev. 33 (1975), *reprinted in* Mil. L. Rev. Bicent. Issue 609, 629 n.113 (1976) [hereinafter cited to the reprinted text only].

damus.[82] The second branch pertained to the Supreme Court, the courts of appeal, and the district courts, granting them the power to issue writs "which may be necessary for the exercise of their respective jurisdiction."[83] The first branch was treated as an independent grant of power, while the second was deemed merely to recognize powers ancillary to preexisting jurisdiction.[84]

Since their merger in the 1948 version of the Act which included the pertinent wording of both the old sections, it has generally been considered that the supervisory function, historically attributed only to the Supreme Court, has not been conferred on the lower federal courts.[85] To a certain extent the question of whether it is an independent grant of power is not so critical to this discussion because of the federal courts' much broader statutory jurisdiction. However, it is extremely important when discussing its application to the restricted jurisdiction of CMA.

The question of practical consequence was what restrictions were to be placed on the courts of appeals' exercise of these writs. Initially they could act only when their existing jurisdiction over a case was threatened.[86] This restriction was relaxed by allowing the exercise of the power to protect potential jurisdiction.[87] Finally, after making the frustration of jurisdiction merely one consideration,[88] the Supreme Court in *La Buy v. Howes Leather Co.*[89] authorized a court of appeals to issue a writ of mandamus where there was no question of interference with even potential jurisdiction. Some commentators, most notibly Captain Wacker, an Air Force judge advocate whose article was quoted with approval by CMA in its opinion in *McPhail*,[90] argued that *La Buy* can be read to create a type of supervisory writ power, supervisory mandamus.[91] Con-

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[82] First Judiciary Act, ch. 20, § 13, 1 Stat. 80 (1789), which became § 234 of the Judicial Code of 1911, ch. 231, § 234, 36 Stat. 1156.

[83] First Judiciary Act, ch. 20, § 14, 1 Stat. 81 (1789), which became § 262 of the Judicial Code of 1911, ch. 231, § 262, 35 Stat. 1162.

[84] *See Ex parte* Bradley, 74 U.S. (7 Wall.) 364 (1868).
[85] Wacker, *supra* note 81, at 630 n.113.
[86] *See, e.g.*, McClelland v. Carland, 217 U.S. 268 (1910).
[87] *Ex parte* Peru, 318 U.S. 578 (1943).
[88] Roche v. Evaporated Milk Association, 319 U.S. 21 (1943).
[89] 352 U.S. 249 (1957).
[90] 1 M.J. at 462, 24 C.M.A. at 310, 52 C.M.R. at 21.
[91] Wacker, *supra* note 81, at 635-36 and 639-42.

sistent with the public interest orientation of this theory, the writ could be issued where the practice or action of the trial judge might adversely affect the administration of justice in future trials.[92] This is a much more lenient requirement than the traditional approach and greatly broadens the scope of the writ power.

This theory is difficult to justify in light of subsequent Supreme Court decisions which restricted the application of this "supervisory power" mentioned in *La Buy*. In a more recent case, *Will v. United States*,[93] *La Buy* was limited only to situations where there is a showing of persistent disregard for federal rules. What has emerged is a series of situations where the court of appeals is recognized to have authority to protect the integrity of its jurisdiction. Although not always specifically mentioned, the court must have some existing jurisdiction over the subject matter.[94] With that as a basis the court can exercise its writ powers to prevent an illegal usurpation of judicial power by a lower court,[95] a deliberate refusal to enforce applicable law,[96] or a clear abuse of discretion.[97] It will not be used merely to correct an error of the lower court in a matter properly within its jurisdiction.[98]

McPhail involved the court-martial of an Air Force sergeant who raised a defense of lack of military jurisdiction over the offense. The military judge agreed that the military could not constitutionally try him and dismissed the charges.[99] His decision was reviewed by the convening authority under UCMJ Article 62(a) and overruled, and McPhail was subsequently tried and convicted. Since his sentence did not include a punitive discharge, his case could not be reviewed by an appellate court, and he could seek review only under UCMJ Article 69.[100] His appeal to the Judge Advocate General of the Air

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[92] *Id.* at 639.
[93] 389 U.S. 90, 104 n.14 (1967).
[94] Price v. Johnson, 334 U.S. 266, 279 (1948).
[95] Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).
[96] 389 U.S. at 104.
[97] *See* note 95 *supra*.
[98] 389 U.S. at 104 n.14.

[99] 1 M.J. at 458, 24 C.M.A. at 306, 52 C.M.R. at 17. The judge relied on the criteria for jurisdiction set out in Relford v. Commandant, 401 U.S. 355 (1971), and O'Callahan v. Parker, 395 U.S. 258 (1969).

[100] If the sentence does not qualify for review by a Court of Military Review under U.C.M.J. art. 66(b), the serviceman can appeal his case to the branch Judge Advocate General, who will rule on any alleged errors.

Force was denied, and he petitioned CMA for extraordinary relief. CMA granted the relief on the basis of its recent decision in *United States v. Ware*[101] and agreed with the determination of the trial judge. In granting relief, the court threw off the restraints of its prior decisions declaring:

> Reexamining the history and judicial application of the All Writs Act, we are convinced that our authority to issue an appropriate writ in "aid" of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67.[102]

CMA's decision was a crucial assertion of power in its scheme of changing the military judicial system. However, it appears that the court did not feel forced into such an assertion, as the authorities that CMA cited for its decision were already available and had been used at the first assertion of the power in *Bevilacqua*. No new factor or support was cited by the court except a reference to a law review article,[103] stating that they had unnecessarily limited their power in *Snyder*. It has been suggested by at least one commentator that CMA did not arrive at the decision because of the doctrinal pressure of its prior cases but rather because it wished to move into a power vacuum which it perceived.[104]

The court's theoretical justification left much to be desired, and the court candidly stated that this judicial function to supervise the military justice system "distinct from its authority to review for error, [those cases authorized] under Article 67, . . . ," was based only on "legislative intention and judicial contemplation."[105] Admittedly there is much language in the various Congressional hearings, casting CMA in the role of supervisor of the judicial system. The Supreme Court has definitely come to view the military as having an integrated justice system with CMA having primary responsi-

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[101] 1 M.J. 275, 24 C.M.A. 102, 51 C.M.R. 275 (1976). The court held that when a convening authority reviews a decision by a military judge under U.C.M.J. art. 62(a), the military judge is not bound to follow the convening authority's decision. *Ware* was pending before C.M.A. when the Judge Advocate General denied McPhail's petition.

[102] 1 M.J. at 462, 24 C.M.A. at 309-10, 52 C.M.R. at 20-21.
[103] *Id.* Citing Wacker, *supra* note 81.
[104] Cooke, *supra* note 15, at 268.
[105] 1 M.J. at 462, 24 C.M.A. at 309, 52 C.M.R. at 20.

blity for supervision of the system.[106] However, this appears to be a rather weak basis for such a broad assertion of power which seems to be at odds with existing law.

Using this supervisory role as a base, CMA apparently embraces to some extent the "supervisory writ" theory espoused by the Wacker article. The court makes a questionable citation to an 1879 Supreme Court case, *Virginia v. Rives*,[107] quoting it for authority to force the lower courts to do their duty. The case that CMA cites was construing the power of the Supreme Court under section 13 of the Judiciary Act of 1789. As was discussed earlier, this authority has been interpreted as pertaining only to the Supreme Court and did not pass to the lower federal courts after the 1948 version. Either CMA made an error in citing to the case, or else it believes it has in the military system the same powers as the United States Supreme Court, a questionable analogy. However, the opinion does not elaborate.

Similarly unsettling is the court's reference to limitations on its power, citing the same statement in *Noyd* which had earlier caused it to deny authority to act in all courts-martial. Somewhat surprising is CMA's failure to mention an intervening case, *Parisi v. Davidson*,[108] where the Supreme Court stated that CMA itself had the power to resolve its jurisdictional problems, citing *Bevilacqua*. With such a clear opening to reconsider CMA's position, it is difficult to explain why the opinion did not make use of *Parisi*.

While the mere assertion of supervisory power over the entire military justice system stands as a milestone, it is of paramount importance to ascertain how CMA will utilize this power in issuing extraordinary writs. This task is made difficult by the lack of a unified theory in past cases and very little elaboration in the primary opinion. Although the court mentioned limits on the exercise of this new power, it did not specify them and the clear import of the opinion was that CMA could issue an extraordinary writ in any court-martial case.

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[106] Schlesinger v. Councilman, 420 U.S. 738 (1975). In this case the court observed, "Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals." *See also* United States v. Augenblick, 393 U.S. 348 (1969).

[107] 100 U.S. 313 (1879).
[108] 405 U.S. 34 (1972).

Since the *McPhail* decision there has not been a majority opinion which has materially modified its holding. Several things have been made clear by subsequent cases, however. Two are that *McPhail* does not mean that CMA will regularly review special court-martials and that it will not relax its standard of extraordinary circumstances.[109] Another is that a definite internal conflict exists among the members of the court. This disagreement pertains not only to the meaning of *McPhail* but also extends to the overall theory of how the writ power will be exercised.

Judge Cook's actions subsequent to *McPhail* are perhaps the most interesting because it was originally a surprise that he, although generally acknowledged as the most conservative court member, was the author of the *McPhail* opinion. His actions were the most drastic and consisted of a concurring opinion in a case significant in itself, *Stewart v. Stevens*.[110]

In *Stewart* the court dismissed the petition of a seaman who had sought relief before CMA from his punishment under an Article 15 proceeding. The basic opinion gave no reason for the dismissal, but Cook candidly explained in his opinion that he was dismissing the petition because he had been wrong in *McPhail* as to the scope of the court's extraordinary relief jurisdiction.[111] He found that Congress had preempted the court's authority to grant extraordinary relief in cases not reviewable under UCMJ Article 67 by giving that authority to the Judge Advocate General under UCMJ Article 69. By analogy he also construed Congressional intent as excluding Article 15 proceedings from the court's writ jurisdiction. His opinion, however, did not rescind all of *McPhail*, and he seemed to indicate that CMA still has general supervisory power over the military justice system except in areas specifically excluded by Congress.[112]

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[109] Since *McPhail*, C.M.A. has not granted extraordinary relief in a special court-martial proceeding, where C.M.A. could not ordinarily review the outcome. As to C.M.A. reluctance to grant writs, *compare* Corley v. Thurman, 3 M.J. 192 (1977) (Perry, J., dissenting); Harris v. Prillman, 3 M.J. 378 (1977) (Perry, J., dissenting); White v. Blount, 4 M.J. 62 (1977) (Perry, J., dissenting).

[110] 5 M.J. 220 (1978), *see* text at notes 144-146, *infra*.

[111] *Id.*, at 221.

[112] *Id.*, at 222. Judge Cook wrote in his concurring opinion in the Stewart case, "I think the authority of this Court, as the highest judicial authority in the military justice system, should encompass the kind of extraordinary jurisdiction posited in *McPhail*, but in the face of the clear purpose of Congress to have it otherwise, I

In *Elliot v. Wilcox*,[113] the court denied a petition for an extraordinary writ in a court-martial which had adjudged a sentence insufficient to qualify for judicial appellate review. Chief Judge Fletcher dissented, arguing that there was absolutely no jurisdiction in this case under the decision in *McPhail*, and that even denying the petition suggested some color of jurisdiction. He did not elaborate on exactly why this would be an impermissible extension of *McPhail*, but he quoted from the opinion, emphasizing the words "we have jurisdiction to require compliance with applicable law . . . "[114]

When we remember that *McPhail* on its facts enforced a prior pending CMA decision, this reference may indicate an intention to use this type of writ only as an enforcement tool. More probably this should be viewed as stressing merely that the use of the writ power under *McPhail* is supervisory in nature, and the court does not assume that it has general authority to review these previously unappealable courts-martial.

While it is true that Chief Judge Fletcher voted to dismiss the petition in *Stewart*, a little more than a month later he went out of his way to reaffirm CMA's general supervisory authority over the entire military justice system. In a nonextraordinary writ case, *United States v. Jackson*,[115] the Chief Judge writing for the majority repeatedly referred to this power, citing *McPhail*, as the authority for requiring assignment of counsel for all prisoners confined for more than a brief period of time.[116]

While Judge Perry's view as to the scope of this authority is somewhat unclear,[117] he seems to have a definite opinion as to how

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am bound to accept the limitations it imposed." He wrote a similar majority opinion in United States v. Booker, 5 M.J. 246, 248 (1978) (opinion on reconsideration) (Fletcher, C.J., dissenting).

[113] 3 M.J. 210 (1977) (Fletcher, C.J., dissenting).

[114] *Id.*

[115] 5 M.J. 223 (1978).

[116] Judge Cook, concurring in the result, noted that, in his view, the majority had misplaced its reliance on *McPhail*. Specifically, he felt that the court was extending its supervisory power beyond *McPhail*, in that there was no basis in either the code or the Constitution for the court's procedural requirement for assignment of counsel. As Cook reiterated his modified view of the supervisory power, this case can be looked upon as a reaffirmation by both Fletcher and Cook of their respective positions.

[117] He joined with Fletcher in denying the position in *Stewart* and concurred with him again in the opinion in *Jackson*. However, he also concurred with Cook in the opinion on reconsideration in *Booker*.

extraordinary writs should be used. In *Corley v. Thurman*,[118] CMA denied a petition for habeas corpus which was based upon the convening authority's decision not to defer service of the petitioner's sentence pending appeal. This case was reviewable by CMA.

Judge Perry dissented, arguing that the facts did not warrant incarceration, regardless of the standards used by the convening authority. He cited several cases where the court had declared its power to review convening authorities' decisions for abuses of discretion in similar situations.[119] Perry seems to interpret the writ power to be such that it will be used to remedy all situations where there are insufficient facts, or at least where the wrong facts are used, to support the decision. Such an interpretation is inconsistent with the use of extraordinary writs as supervisory tools and is more akin to the traditional function of habeas corpus.

While the majority's rationale is not set forth, the decision seems consistent with the use of supervisory writs in the federal court system. There, as previously mentioned, the appellate courts should not use these writs to correct mere errors in decision making in the subordinate courts where there is valid jurisdiction.[120] Admittedly, here we are not considering a court but an officer exercising a quasi-judicial function; yet even so there is no evidence of a pattern of abuse or a usurpation of authority.

With such a difference of opinion, the exact holding and application of *McPhail* is unclear. The general assertion of supervisory power over the military justice system remains viable, but its exact application is in question. Even though the author of the opinion has repudiated *McPhail's* extension of what is "in aid of jurisdiction," the other two members of the court have not spoken directly on the issue. What does seem clear is that, as the *Stewart* decision indicates, CMA will not try to radically extend the current scope of *McPhail*.[121]

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[118] 3 M.J. 192 (1977) (Perry, J., dissenting). Judge Perry has likewise dissented in four cases subsequent to *Corley* where CMA denied petitions in similar situations.

[119] *Id.*, at 193, *e.g.*, Fletcher v. Commanding Officer, 2 M.J. 234, 25 C.M.A. 379, 54 C.M.R. 1105 (1977); Courtney v. Williams, 1 M.J. 267, 24 C.M.A. 87, 51 C.M.R. 260 (1976); Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970); Reed v. Ohman, 19 C.M.A. 110, 41 C.M.R. 110 (1969).

[120] *See* note 98 *supra*.

[121] While the court's decision in United States v. Jackson, 5 M.J. 223 (1978), may be viewed as an exception, it is more properly a forum for Fletcher's reaffirmation

IV. CMA'S UTILIZATION OF EXTRAORDINARY WRITS: LACK OF A UNIFIED LEGAL THEORY

Throughout the history of extraordinary writs in the military justice system, controversy was centered upon the scope of CMA's jurisdiction while considerations of how the writs should be used were neglected. As has been shown, CMA has been less than clear in most of its opinions as to the theory under which it was operating. To be sure, there was much language in the seminal cases about general intent of Congress and vindication of serviceman's rights. However, the writ power under the All Writs Act has not generally been used to protect individual rights in a particular case but has been aimed at protecting the integrity of the judicial system and protecting against judicial excess. Admittedly the ultimate reason for a fair, properly operating judicial system is the protection of individual rights, but this loses sight of the specific use of this type of writ to control the system. Neither the individual-oriented theory nor the system-oriented theory adequately describes the way the CMA has utilized this writ power. In fact it is perhaps impossible to arrive at a unified theory based on the traditional writ theories.

Most observers of the military writ system attempt to analyze it by looking at the type of writs issued, the jurisdiction to issue them, and the requirement for exceptional circumstances.[122] However, this analysis will not give a clear picture of how they are used. The basis for understanding their use is to understand the tension within the system, the general goal of CMA to judicialize it, and its flexible use of writs to exercise power, control the system, and effectuate its goals.

CMA has used its appellate authority to instruct, to mold the system, and to shift the balance of power away from the convening

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of the basic holding of *McPhail*. *See* note 116, *supra*. Even though Cook in his concurring opinion views Fletcher as relying on the supervisory power expressed in *McPhail*, the same results could have been justified on other grounds.

The two major areas of possible expansion by C.M.A. after *McPhail* were administrative discharges and nonjudicial punishment under U.C.M.J. art. 15. Since C.M.A. has declined to extend its power into these areas, and given the current tension in the military justice system, it appears that, at least for the moment, C.M.A. will not move to extend *McPhail* beyond its current holding.

[122] *See* H. Moyer, *supra* note 22, at § 2-835.

authority and to the courts.[123] This authority has not allowed it to reach the entire system because, as mentioned before, its appellate jurisdiction is limited by statute, which is why *McPhail* was of such great importance. Additionally, some of the areas where CMA wanted to shift the balance of power, those areas where the convening authority had great influence such as pre- and post-trial confinement, were not capable of being reached effectively by appellate authority.[124] Review took too long, with the result that the issue that CMA wanted to reach was often moot. In other cases the critical issue was not even appealable. One of the instruments that has been utilized by CMA to fill in the gaps where its normal appellate power could not reach was extraordinary writs, which performed many useful roles.

One way in which the writs were utilized was in shifting power within a certain area. The most striking example of this is the pretrial confinement area, where the UCMJ and early decisions of the court give preeminence to the convening authority. When CMA decided to introduce judicial review into the area, it issued extraordinary writs. Early writ cases established that the commander's decisions were subject to judicial review for abuse of discretion.[125] The court ran into a problem because of the statutory provisions which gave a military judge authority over an individual only once his case had been referred to trial.[126] In *Phillipy v. McLucas*, in 1975, the court stretched this restriction to the breaking point by ordering cases referred to trial so that the judge could review the confinement.[127]

Perhaps realizing that it could not further circumvent the UCMJ, CMA took a different tack in another writ case, *Courtney v. Williams*.[128] In this case, the court required that a decision to imprison an individual before trial be reviewed by a neutral and detached magistrate. Thus, extraordinary writs were used as instruments of change to shift power, not to control a lower court.

Using extraordinary writs to change the system rather than maintain the existing structure is an approach which does not com-

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[123] *Cf.* Cooke, *supra* note 15.
[124] *See* text at notes 59-66 *supra*.
[125] Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970); Reed v. Ohman, 19 C.M.A. 110, 41 C.M.R. 110 (1969).
[126] *See* Cooke, *supra* note 15, at 84-86.
[127] 50 C.M.R. 915 (C.M.A. 1975).
[128] 1 M.J. 267, 24 C.M.A. 87, 51 C.M.R. 260 (1976).

port with traditional writ theories. Another unorthodox utilization of these writs is to persuade. Although it has not been mentioned explicitly by the court, their policy of asserting jurisdiction over an area and describing what they considered circumstances warranting relief without exercising the power is a form of persuasion.[129] Due to the nature of the writs, it is wiser to subtly induce the chain of command to change its practices, because exercise of the writ power without prior warning would result in a confrontation.[130]

Akin to this is the utilization of writs as a teaching vehicle, an example of which is *Collier v. United States*.[131] In that case, CMA announced that a serviceman awaiting a rehearing was not to be treated like a convicted person.

Enforcement is one of the prime uses of extraordinary writs in the military due to the quickness with which they can lead to redress of a violation. This utilization of writs is consistent with their general use in the federal sphere, and is an exercise of supervisory power in aid of past jurisdiction. In the military context, this has been a most effective tool for an activist court to insure that its often controversial decisions and policies are followed.

CMA has used writs to order a court of military review[132] and a judge advocate general[133] to follow CMA's current decisions. Recently in *Johnson v. Thurman*[134] it used a different approach, granting a petition for a writ of habeas corpus until a neutral and detached magistrate conducted a hearing in accordance with *Courtney*.[135] This is unique because it is the first time that CMA has used its writ power to prod the military authorities into adopting an affirmative program.

The writs utilized in the military justice system are writs of prohibition, mandamus, error coram nobis, certiorari, and habeas cor-

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[129] *See e.g.*, Reed v. Ohman, 19 C.M.A. 110, 41 C.M.R. 110 (1969); Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967).

[130] A good example of this is the Army's establishment of a magistrate system, mentioned in *Courtney*, to review pretrial confinement. Evidently this action was taken in response to C.M.A.'s decisions in this area.

[131] 19 C.M.A. 511, 42 C.M.R. 113 (1970).
[132] United States v. Boards of Review Nos. 2, 1, 4, 17 C.M.A. 105, 37 C.M.R. 414 (1967).
[133] McPhail v. United States, 1 M.J. 457, 24 C.M.A. 304, 52 C.M.R. 15 (1976).
[134] 3 M.J. 373 (1977).
[135] *See* text at notes 61-62 *supra*.

pus. Although each has a distinct function and history,[136] the label of the particular relief requested is not of paramount importance in the military system as long as the relief requested is specified. Often the petitions to CMA are titled "petition for extraordinary relief" or "appropriate relief."[137] Generally there is no problem because the relief normally is issued as an order. There is, however, one major problem in that CMA and the Supreme Court have erroneously used the term *habeas corpus*.

Theoretically, CMA bases its writ authority on the All Writs Act, since that is the only writ statute that is applicable to it. The military system, unlike the federal system, does not include a statute authorizing a court to issue a writ of habeas corpus *ab subjuciendum*, the so-called "great writ" by which the legality of restraint can be tested, and CMA has directly held that it has no power to issue such a writ under 28 U.S.C. § 2241.[138] Therefore, when CMA refers to a writ of habeas corpus, it must mean habeas corpus in the All Writs Act sense.

This writ unfortunately is traditionally the weakest and least used writ under the Act and has only been utilized a handful of times.[139] It does not carry with it the vast powers to have a full evidentiary hearing in order to test the legality of restraint, with the ultimate power to command the individual's release. However, when habeas corpus is invoked by CMA, in practice it is issuing the "great writ," not the narrow All Writs Act type.[140]

The Supreme Court in *Noyd*[141] declared that CMA could issue emergency writs of habeas corpus, supposedly relying on the All Writs Act. The relief that it contemplates is again the "great writ," not the narrow, weaker version. The end result is that, even though it has been held that the right of issuance of this powerful type of

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[136] For a good comprehensive discussion of the various types of writs, *see* Rankin, *The All Writs Act and the Military Judicial System*, 53 Mil. L. Rev. 103 (1971).
[137] H. Moyer, *supra* note 22, § 2-832, at p. 645.
[138] Robison v. Abbott, 23 C.M.A. 219, 49 C.M.R. 8 (1974).
[139] *See* United States v. Hayman, 342 U.S. 205 (1952); Price v. Johnson, 334 U.S. 266 (1948).

[140] *E.g.*, Collier v. United States, 19 C.M.A. 511, 42 C.M.R. 113 (1970). The language of *Collier* makes clear that the court was using the terminology, and following the general procedures for, a writ of habeas corpus *ad subjuciendum*.

[141] 395 U.S. at 695 n.7.

habeas corpus must be conferred by statute,[142] CMA exercises this power without such authorization.

The discussion above indicates that traditional theories or even some hybrid theory cannot adequately describe the use of extraordinary writs by CMA. Their use is tied to the necessities of the moment as CMA perceives them in its attempt to judicialize the military. They can only be understood in their relationship to their use by CMA to effectuate this goal. As an example CMA either knowingly or unknowingly has utilized the great powers of habeas corpus without an enabling statute, with the result that it has acquired through a sort of judicial self-help a powerful tool with which to attack pre-trial and post-trial confinement.

V. CMA, THE MILITARY POWER STRUCTURE, AND THE FUTURE

As has just been discussed, CMA has utilized extraordinary writs in diverse ways as an instrument of power within the military judicial system. However, its powers are not without limits, and it cannot afford to exercise these powers indiscriminately and without regard to its relationship with the chain of command. Much has been written about the contest for control over the military justice system, but the fact cannot be obscured that, as it currently stands, it is an integrated structure intimately involving both sides. For the system to be effective, there must be some degree of cooperation. The tension will always be there as long as the current statutory scheme remains and CMA continues to try to judicialize the system, but it must be kept to a minimum.

CMA must realize that it has inherent weaknesses and that it can circumvent the restrictive statutory provisions only so long. A problem that arises is CMA's lack of analysis and lack of reliance on authority when it exercises the writ powers. As mentioned above, this might be necessitated by its desire to retain its flexibility and perhaps take advantage of powers that technically it should not possess. It pays a price for this in its loss of legitimacy with the military authorities because they see these exercises of writ power as actions taken by the court acting primarily on its own declared au-

[142] *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

thority without solid statutory support. Furthermore, although the court often analogizes its position in the military justice system to that of the Supreme Court, it has none of the constitutional protections which the latter enjoys. Thus it is susceptible to outside pressures by the military authorities as they exercise their leverage in Congress.[143]

The classic example of how this pressure can effect the use of the writ power is the circumstances surrounding the court's refusal in *Stewart* to extend its jurisdiction to include Article 15 proceedings. After *McPhail*, an open question was whether CMA would extend its jurisdiction into two areas which had consistently been held to be outside the scope of the court's authority, administrative discharges, and nonjudicial punishment under UCMJ Article 15.[144] The court flirted with asserting its power in the area of administrative discharges in *Harms v. United States Military Academy*,[145] but declined to exercise it in that case.

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[143] Since C.M.A. is a creation of Congress and exercises authority pursuant to legislative grants, it is extremely vulnerable to pressure from Congress. At the most basic level, the Congress controls the authorization to fund the military justice system in general and the judicial system in particular. While any sort of pressure by the military authorities in the financial area must not be too blatant, it must be remembered that they submit the budget request to Congress and have great discretion in what they can request.

The most direct changes can be made by statutory enactment and the military again has many solid supporters in Congress who will cooperate fully with the military authorities to accomplish their goals. Due to the nature of the Congressional system, these supporters occupy many key positions and have great influence in Congress.

[144] Whalen v. Stokes, 19 C.M.A. 636 (1970) (review of Article 15 not in aid of jurisdiction); *In re* Guadalupe, 18 C.M.A. 649 (1969) (review of request for a hardship discharge not in aid of jurisdiction); Mueller v. Brown, 18 C.M.A. 534, 40 C.M.R. 246 (1969) (C.M.A. will not review a denial of conscientious objector discharge).

[145] Misc. Doc. No. 76-58 (C.M.A. Sept. 10, 1976). Harms challenged the administrative discharge of West Point cadets for violations of the Cadet Honor Code. Although the court denied the petition, it did so only after oral arguments, the submission of briefs, and specifically "without prejudice to reassert any errors after petitioners have exhausted their administrative remedies and provided the sanction of dismissal or its equivalent is imposed."

Almost exactly the same language was used in the first opinion in Stewart v. Stevens, 4 M.J. 176 (1978). Since *Stewart* was ultimately dismissed, it can be strongly inferred that C.M.A.'s view as to its jurisdiction over administrative discharges is the same as its view concerning its jurisdiction over nonjudicial punishment.

In *Stewart*,[146] CMA was presented with a petition for extraordinary relief and a temporary restraining order involving a serviceman who had been administered nonjudicial punishment. Since the nonjudicial punishment was not final and the internal administrative appeal procedures had not been completed, CMA denied the writ without prejudice to seek further relief if deemed necessary after the appeal was completed.

The initial action was taken in December 1977, and it seemed as if the court might extend its jurisdiction into the Article 15 area for no other reason than the circumstances of the particular case.[147] However, CMA was dealing with a very sensitive area. Nonjudicial punishment under Article 15 had been traditionally considered to be within the sole authority of the chain of command, and it was considered essential for proper control and discipline.

Between the date of the initial order in *Stewart* and the final order in June 1978, several events occurred which tended to show the court that the military authorities felt that something should be done about CMA. In March 1978, the General Counsel of the Department of Defense called for the shifting of final review authority for military cases away from CMA.[148] This proposal was followed up by a bill introduced in the Senate by Senator Strom Thurmond (R-S.C) which called for essentially the same shift of review authority to the United States Fourth Circuit Court of Appeals in Richmond, Virginia.[149] Finally, the Department of Defense cut ap-

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[146] 4 M.J. 176 (1977) (petition dismissed without prejudice); 5 M.J. 220 (1978) (petition dismissed).

[147] Stewart was a sailor assigned to the USS Bryce Canyon, a ship that was docked at a naval base for an extended period of time. Stewart allegedly committed a drug offense off-base in the civilian community, and his commander initially wanted to court-martial him. However, the commander learned that Stewart could not be tried by a military court due to lack of jurisdiction over the off-base offense. Because of this Stewart was given nonjudicial punishment under U.C.M.J. art. 15.

Stewart was assigned to a vessel rather than to a shore unit. Because of this, he did not have the right to demand trial by court-martial. This limitation is imposed by paragraph 132 of the Manual for Courts-Martial (1969 Rev. ed.). The rule applied even though his ship was docked at a major naval base in the United States and the rationale behind the rule was not applicable. Thus, although he could never be tried in a court-martial due to lack of military jurisdiction, a Manual for Courts-Martial provision was technically employed to force him to submit to military jurisdiction and accept nonjudicial punishment.

[148] *See* note 14, *supra*.
[149] *Id.*

proximately $150,000 from the budget requested by CMA when it submitted its appropriations request to the Congress.[150]

While these actions probably were not taken with the *Stewart* case in mind, the obvious intentions of the military power structure were not lost on CMA. In June 1978, it not only declined to exercise its writ power but dismissed the petition, implying that it had no jurisdiction whatsoever.[151] There are also indications that the decisions of CMA in areas not involving extraordinary writs have been affected by this pressure.

While the actual effect of the pressure on CMA and CMA's reaction to it may be uncertain, this confrontation highlights the continuing tension within the military justice system. The future exercise of extraordinary writ powers will continue to be dependent upon the practical realities limiting the court's exercise of supervisory authority within a judicial system where it shares power with the military chain of command.

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[150] The request in question was $150,000 for a neutral and independent study of the military justice system. Chief Judge Fletcher was very angry over deletion of this item. He complained bitterly to the Senate Appropriations Subcommittee. It was reported at the time that the General Counsel of the Department of Defense, Deanne C. Siemer, recommended that the $150,000 be deleted from the budget request that was submitted to Congress. Army Times, May 1, 1978, at 4.

[151] The court never really had an option to merely deny the writ and hint at some sort of jurisdiction over nonjudicial punishment. The egregious nature of the circumstances effectively negated this approach, and CMA was faced with either exercising its power and granting the writ, or dismissing the writ and all but conceding that it had no jurisdiction in the area. For reasons cited, it opted for the latter approach and dismissed.

THE SIXTH AMENDMENT AND MILITARY CRIMINAL LAW: CONSTITUTIONAL PROTECTIONS AND BEYOND*

by Major Norman G. Cooper**

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.*[1]

I. INTRODUCTION

"More than any other provision of the Constitution, the sixth amendment epitomizes the adversary system."[2] It provides the fundamental protections for a person accused of crime in our adversary

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* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's school, the Department of the Army, or any other governmental agency.

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[1] U.S. Const. amend VI.

[2] Imwinkelreid, *Chambers v. Mississippi*, ___ U.S. ___ *(1973): The Constitutional Right to Present Defense Evidence*, 62 Mil. L. Rev. 225 (1973).

criminal system. The essence of these protections is that an accused person be afforded a fair hearing.[3] A fair hearing contemplates a speedy and public trial by an appropriate fact-finding body, and notice of the accusations with an opportunity to confront one's accusers and present a defense with the assistance of counsel.

The sixth amendment is the primary source of all of these protections, and, of course, is generally available to a military accused because "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."[4] How well have military courts met the responsiblity of securing a fair trial for military accused by applying the fundamental protections of the sixth amendment? This article examines the basic provisions of the sixth amendment as they apply in military criminal law. It surveys the several clauses of the sixth amendment *seriatim*, and also addresses statutory and other protections available to a military accused as well as judicial enhancement of sixth amendment provisions.

II. RIGHT TO SPEEDY AND PUBLIC TRIAL

A. THE SIXTH AMENDMENT SPEEDY TRIAL REQUIREMENT

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial . . . . "[5] Regarding one's right to a speedy trial, the Supreme Court has held "that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."[6]

Article 10 of the Uniform Code of Military Justice[7] has not only been held to reiterate the basic guarantee of the sixth amendment's speedy trial provision[8] but to "demand more expeditious military trials than does the Constitution."[9] It has been axiomatic in military

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[3] *Id.* at 227-228.
[4] Burns v. Wilson, 346 U.S. 137, 142 (1953): *see also* United States v. Jacoby, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).
[5] U.S. Const. amend. VI.
[6] Klopfer v. North Carolina, 386 U.S. 213, 233 (1967).
[7] 10 U.S.C. § 810 (1976).
[8] United States v. Hounshell, 7 C.M.A. 3, 21 C.M.R. 129 (1956).
[9] United States v. Marshall, 22 C.M.A. 431, 47 C.M.R. 409 (1973).

criminal trials that a military accused should have the benefit of more stringent speedy trial requirements in circumstances of arrest or confinement prior to trial[10] because a military accused "does not have the same opportunity for bail"[11] as does his or her civilian counterpart.[12]

Although Article 10, U.C.M.J., embodies the primary source of a military accused's right to speedy trial, and is more protective than the Constitutional guarantee, it is only triggered by arrest or confinement.[13] Indeed, a military accused must be "in arrest or confinement for a period of some significant duration before the Government runs the risk of activating Article 10."[14] Thirteen days of pretrial confinement alone has been held insufficient to constitute a violation of Article 10.[15] In the absence of arrest[16] or confinement[17]

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[10] Article 10, Uniform Code of Military Justice (hereafter cited as U.C.M.J.) provides in pertinent part: "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him."

[11] United States v. Mock, 49 C.M.R. 160, 161 (A.C.M.R. 1974); *see also* Hopson, *The Law of Speedy Trial: United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166; United States v. Hubbard, 21 C.M.A. 131, 44 C.M.R. 185 (1971)*, 57 Mil. L. Rev. 189 at note 5 (1972).

[12] Article 10, U.C.M.J., provides in part that "[a]ny person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement as circumstances require."

This statutory basis for pretrial restraint has been extended by the Court of Military Appeals to require not only a prompt review by a neutral and detached magistrate of pretrial confinement under strict standards but also adoption and application to the military justice system of many of the requirements pertaining to pretrial release found in Part V, American Bar Association, Standards, Pretrial Release (1968). *See* United States v. Heard, 3 M.J. 14 (C.M.A. 1977), and United States v. Malia, 6 M.J. 65 (C.M.A. 1978); *see also* Cooper, *Have You* Heard? *New Rules for Pretrial Confinement*, The Army Lawyer, May 1977, at 21. Thus, the absence of bail in the military justice system has led to considerable judicial constraint upon pretrial restraint of a military accused.

[13] United States v. Nelson, 5 M.J. 189 (C.M.A. 1978).
[14] *Id.* at 190.
[15] *Id.*

[16] The majority of the Court of Military Appeals has held that, while a general restriction to the confines of a military installation may not be considered the equivalent of confinement for purposes of article 10, U.C.M.J., it does constitute arrest under article 9(a), U.C.M.J. The latter article defines arrest as "the restraint of a person by an order, not imposed as a punishment for any offense, directing him to remain within certain specified limits."

[17] A severe restriction to a unit area with hourly sign-in procedures has been held tantamount to confinement for purposes of article 10, U.C.M.J. *See* United States v. Schilf, 1 M.J. 251 (C.M.A. 1976).

a military accused can only rely upon the sixth amendment's basic right to a speedy trial to protect against unwarranted government delay.[18]

Whether one's right to speedy trial guaranteed by the sixth amendment applies to military criminal trials implicitly in the operation of statutory provisions,[19] by "military due process,"[20] or by *force majeure*,[21] it enjoys a special significance because of statutory, executive, judicial and command enhancement. That is, in addition to the provisions of Article 10, U.C.M.J.,[22] Congress has established certain procedural and punitive articles of speedy trial import: Article 33, U.C.M.J. provides that when one is pending trial by general court-martial, ordinarily within eight days of arrest or confinement the charges and investigation shall be forwarded to the general court-martial convening authority;[23] and Article 98, U.C.M.J., makes it a crime to unnecessarily delay the disposition of a military accused's case.[24]

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[18] United States v. Nelson, 5 M.J. 189 (C.M.A. 1978).

[19] "It is apparent therefore that the draftsmen of the Uniform Code and Congress . . . reaffirmed an accused's right to a speedy trial, which he could effectively enforce by a motion for appropriate relief." United States v. Hounshell, 7 C.M.A. 3, 21 C.M.R. 129, 134 (1956).

[20] *See* Tichenor, *The Accused's Right to a Speedy Trial in Military Law*, 25 Mil. L. Rev. 1, 2-8 (1971).

[21] "[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244, 246-47 (1960). Also, the "burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).

[22] "Article 10, Uniform Code of Military Justice, 10 U.S.C. § 810 (1970), provides the sole statutory basis for the right to a speedy disposition of criminal charges lodged against an accused person in the military justice system." United States v. Nelson, 5 M.J. 189, 190 (C.M.A. 1978).

[23] When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report to that officer the reasons for the delay.

10 U.S.C. § 833 (1976).

[24] Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

Article 33, U.C.M.J.,[25] has been held not to embody any substantive rights or protections, but "simply is a procedural mandate, deviation from which must be measured for specific prejudice to the accused (citation omitted)."[26] Similarly, while Article 98, U.C.M.J.[27] has been cited with vigor[28] in decisions by the Court of Military Appeals, there are no reported cases of successful prosecution under its provisions.

The President in promulgating the 1969 Manual for Courts-Martial[29] added two new paragraphs dealing with speedy trial based upon judicial developments. Paragraph 68*i* of the Manual states that "[a]n accused has the right to a speedy trial, the denial of which may be asserted by a notion to dismiss."[30] The Manual further provides substantive rules pertaining to speedy trial in paragraph 215*e*,[31] indicating that a military accused has a right to trial "within a reasonable time after being placed under a restraint such as restriction,

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(2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct. 10 U.S.C. § 898 (1976).

[25] 10 U.S.C. § 833 (1976).

[26] United States v. Nelson, 5 M.J. 189, 190 note 1 (C.M.A. 1978).

[27] 10 U.S.C. § 898 (1976).

[28] The culprits [who endanger military society in the area of speedy trial] are those persons in command charged with the responsibility of enforcing and acting within the purview of the Uniform Code of Military Justice. The way to protect the military society from the "guilty accused" who have not been provided a speedy trial is to enforce by prosecuting those who chose to ignore the obligation to their society mandated by the Uniform Code of Military Justice.

(Fletcher, C.J., concurring in the result) United States v. Perry, 2 M.J. 113, 116 (C.M.A. 1977).

See also United States v. Powell, 2 M.J. 6 (C.M.A. 1976), wherein the Court of Military Appeals cited an investigating officer as having come "perilously close" to violating article 98, U.C.M.J. *See generally* Thorne, *Article 98 and Speedy Trials—A Nexus Revisited?* The Army Lawyer, July 1976, at 8.

[29] The Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MCM] is an executive order of the President issued pursuant to the authority granted by Congress to prescribe court-martial procedures. It should be noted that the Court of Military Appeals narrowly construes this grant of authority: "Article 36, UCMJ, 10 U.S.C. § 836, only authorizes the President of the United States to prescribe rules of procedure, including modes of proof, *in cases before courts-martial* [emphasis added] (citation omitted)." United States v. Heard, 3 M.J. 14, 20 note 12 (C.M.A. 1977).

[30] MCM, *supra* note 29, at para. 68*i*.

[31] MCM, *supra* note 29, at para. 215*e*.

arrest, or confinement or after charges are preferred. *See Article 10.*" (Emphasis added)[32] It is evident from this language that the President has promulgated a broad standard for speedy trial under Article 10, U.C.M.J., and the sixth amendment.[33]

Perhaps the most important realization of a military accused's right to speedy trial is found in the "nonstatutory, nonconstitutional rule"[34] of *United States v. Burton.*[35] The so-called *Burton* rule applies to offenses committed after December 17, 1971 in circumstances where a military accused has been awaiting trial in confinement more than ninety days.[36]

There are two aspects of the *Burton* rule which enhance a military accused's right to speedy trial: first, when the ninety-day pretrial confinement period is exceeded, the government incurs a heavy burden of justifying the delays, and in the absence of any extraordinary circumstances, the charges should be dismissed. Second, when a military accused requests speedy disposition of the charges, the government must proceed immediately or show adequate cause for further delay.[37]

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[32] *Id.*

[33] The Court of Military Appeals gives little effect to the President's pronouncements in the Manual when a matter of "substantive law" is at issue. Thus, for example, as to mental responsibility, the Court of Military Appeals did not feel bound to "accept the standard set forth in paragraph 120*b*, MCM, as a valid exercise of the President's power to prescribe rules of procedure under Article 36, UCMJ, 10 U.S.C. § 836." United States v. Frederick, 3 M.J. 230, 234 (C.M.A. 1977). Instead, in that case the Court adopted the definition of insanity found in the American Law Institute Standard. Model Penal Code § 401, Proposed Official Draft (May 4, 1962).

For an excellent discussion of the insanity issue in military practice *see* Taylor, *Building the Cuckoo's Nest,* The Army Lawyer, June 1978, at 32.

[34] Gilligan, *Speedy Trial,* The Army Lawyer, October 1975, at 1.
[35] 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[36] *Id.* Specifically, the Burton case holds, "[I]n the absence of defense requests for continuance, a presumption of an Article 10 violation will exist when pretrial confinement exceeds 3 months." United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166, 172 (1971).

Note that "3 months" was later delineated as ninety days in United States v. Driver, 23 C.M.A. 243, 49 C.M.R. 376 (1974).

[37] *Id.* at 118, 172. The "request for speedy disposition" rule applies to confined military accused. United States v. Johnson, 1 M.J. 101 (C.M.A. 1975).

The Court of Military Appeals has reaffirmed the necessity for the *Burton* requirement, namely that "the Uniform Code demands a more prompt performance by the government [than civilian law] in bringing the accused to trial."[38] The court has applied the rule rather rigidly in spite of hard results.[39] Recently, however, the Court of Military Appeals has appeared more sympathetic to government travails in bringing a case to trial[40] or at least has been unwilling to disturb lower court opinions sustaining the government.[41] Thus, while there is no question that the *Burton* rule adds considerable impact to a military accused's right to speedy trial, it is also apparent that any too rigid application of the rule should be avoided.[42]

In addition to the sixth amendment right to speedy trial[43] enjoyed by a military accused, as well as the statutory, executive and judi-

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[38] United States v. Marshall, 22 C.M.A. 431, 433, 47 C.M.R. 409, 411 (1973).

[39] In the Henderson case, the Government was accountable for 113 days of pretrial confinement. In spite of the seriousness of the charges—murder and conspiracy to commit murder—and the difficulty of bringing the case to trial in Okinawa, the Court of Military Appeals held, "[T]he law [Burton rule requiring dismissal of the charges] cannot be ignored because it is distasteful to apply it, for even more important than the demand that convicted criminals are to be duly punished is the absolute imperative that the law is fairly and equally applied to all." United States v. Henderson, 1 M.J. 421, 427 (C.M.A. 1976).

[40] *See, e.g.*, United States v. Cole, 3 M.J. 220 (C.M.A. 1977).

[41] *See, e.g.*, United States v. Douglas, 2 M.J. 1091 (A.C.M.R. 1977); *pet. den.*, 3 M.J. 92 (C.M.A. 1977); *pet. for reconsideration denied*, 3 M.J. 132 (C.M.A. 1977).

[42] "The court's inflexibility [in applying the Burton rule to the facts in United States v. Henderson, note 39, *supra*] resulted neither in the achievement of justice nor the maintenance of discipline." Gasch, *Who is Out of Step*? The Army Lawyer, June 1978, at 1, 6.

Criticism of the Burton ninety-day rule as too inflexible is paralleled in civilian law by criticism of the Speedy Trial Act of 1974, 18 U.S.C. § 3161-3174 (1976), as too inflexible. *See* Comment, Rossen and Pratt, "The Speedy Trial Act of 1974: A Suggestion," Vol. 8, No. 3, Cum. L. Rev., Winter 1978.

There are indications that the Court of Military Appeals recognizes the dangers of applying the Burton rule too rigidly: "Speedy trial is never a matter of mere mathematics, whether the total falls short of or exceeds an arbitrary magic figure." United States v. Roman, 5 M.J. 385, 389 (C.M.A. 1978, Fletcher C.J., concurring in the result).

[43] The Supreme Court has expounded four factors to be balanced in each case to determine whether there has been a denial of one's speedy trial right under the

cial gloss on such, one in the armed forces can look to command promulgated rules to secure an expeditious trial.

For example, the Commander-in-Chief, United States Army Europe, has established a so-called "45-day rule" for inferior courts-martial. This rule provides for the dismissal of charges at inferior courts-martial which have not been brought to trial within forty-five days of restraint or preferral of charges.[44] The Court of Military Appeals gave further impetus to this command-made speedy trial provision by holding that the judiciary is vested with "the right as well as the duty to assume Government compliance with the terms of the 45-day rule."[45]

Of course, the judiciary must be careful to conform its speedy trial interpretation of service regulations to situations where specific rights are conferred upon a military accused. In two instances where military judges dismissed charges because of noncompliance with regulatory processing times, the Air Force Court of Military Review granted extraordinary relief reversing the trial judges and affording the government an opportunity to bring the charges anew.[46]

Thus, while it appears that a command may impose additional guarantees of speedy trial which inure to the benefit of those subject to the command's regulation, the mere existence of regulations

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sixth amendment: the length of any delay, the reasons for the delay, any assertion of the speedy trial right during the delay, and any prejudice suffered during the delay. *See* Barker v. Wingo, 407 U.S. 514, 530-533 (1972).

The Court of Military Appeals has stated that this approach is "to be followed in resolving claimed infringements of the Sixth Amendment's right to a speedy trial." United States v. Nelson, 5 M.J. 189, 191 note 7 (C.M.A. 1978).

[44] Para. 2-4.1, USAREUR Supp. 1 to AR 27-10, Military Justice (31 Jan. 1978) provides in pertinent part:

> Unless charges referred to a summary or special court-martial (incl a special court-martial empowered to adjudge a bad conduct discharge) are brought to trial within 45 days from the date pretrial confinement, arrest, or pretrail restriction is imposed or the date charges are preferred, whichever is earlier, the charges will be dismissed by the GCM [general court-martial] convening authority on written application.

[45] United States v. Dunks, 1 M.J. 254, 256 (C.M.A. 1976).

[46] United States v. Dettinger, 6 M.J. 505 (A.F.C.M.R. 1978). This case has been argued before the Court of Military Appeals but no decision has been announced.

concerning the speedy processing of cases does not automatically secure such guarantees.

If there is one facet of the sixth amendment which has direct and unquestionable application to military criminal law practice it is that of the right to a speedy trial. Indeed, a military accused's right to speedy trial has been polished to a striking sheen with statutory, executive, judicial and command embellishments and outshines that of his or her civilian counterpart.

B. RIGHT TO A PUBLIC TRIAL

"While the precise origin of the right to a public trial has been lost in the mist of passing time, there is clear evidence that it is part of our common law heritage."[47] The sixth amendment expressly incorporated the common law right to a public trial.[48]

The tradition of opening military criminal trials can be traced "to the earliest military practices . . . . "[49] A military accused's right to a public trial is explicitly embodied in the language of the Manual: "As a general rule, the public shall be permitted to attend open sessions of courts-martial."[50] More significantly, however, the right to a public trial appears now to be "as full and complete as in civilian courts."[51] That is, the sixth amendment guarantee of a public trial is available to a military accused directly, without regard to any artifice of "military due process."[52]

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[47] United States v. Brown, 7 C.M.A. 251, 22 C.M.R. 41, 45-46 (1956).
[48] *See* Kleimbart v. United States, 388 A.2d 878 (D.C. App. 1978).
[49] Winthrop, Military Law and Precedents 161-62 (2d ed. 1920); *see also* H. Moyer, Justice and the Military, sec. 2-520 (1972).
[50] *See* MCM, *supra* note 29, at para. 53*e*. This same language appeared in the 1951 Manual.
[51] United States v. Mercier, 5 M.J. 866 (A.F.C.M.R. 1978).

[52] In its first consideration of the right to public trial, the Court of Military Appeals was urged by appellate defense counsel to consider "that the right to a public trial is part of military due process and that denial of this right was, *per se*, prejudicially erroneous." United States v. Brown, 7 C.M.A. 251, 22 C.M.R. 41, 44 (1956). Indeed, the court held that an exclusionary order "so impinged upon the right to a public trial that it denied the accused what we view as military due process of law." *Id.* at 49.

Nevertheless, the majority in *Brown* seemed to interpret the Supreme Court's decision in *Ex parte* Quirin, 317 U.S. 1 (1942), as saying that "in cases tried by

In *United States v. Grunden*,[53] a decision most often cited for that part of the opinion concerned with a military judge's duty to instruct on uncharged misconduct,[54] the Court of Military Appeals clearly indicated that military criminal trials fall with the ambit of the sixth amendment right to public trial.[55]

Given the application to military criminal trials of the sixth amendment's right to a public trial, the Court of Military Appeals recognizes that "the right to a public trial is not absolute, and under exceptional circumstances, limited portions of a criminal trial may be partially closed over defense objection (footnote omitted)."[56] In *United States v. Grunden*,[57] the court found that the presentation of classified or security matters may justify the exclusion of the public.[58] In *Grunden* a military judge had excluded the public "from virtually the entire trial as to the espionage matters."[59] The Court of Military Appeals held such action constituted a denial of the accused's right to a public trial because the judge had "failed to satisfactorily balance the competing interests . . . ."[60] The court went

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general court-martial, presentments or indictments by a Grand Jury are not required nor is public trial by jury guaranteed." *Id.* at 47.

Judge Quinn, concurring in the result, on the other hand, found, "[T]he Quirin case does not discuss the right to a public trial; it is merely concerned with the right to a trial by petit jury." *Id* at 50. Ultimately, Judge Quinn was vindicated and *Brown* is overruled to the extent it implies that there is no guarantee to a public trial for military accused. United States v. Grunden, 2 M.J. 116, 102 note 3 (C.M.A. 1977).

[53] 2 M.J. 116 (C.M.A. 1977)

[54] *See, e.g.*, Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43 at 56-57 (1977).

[55] It should be noted that, twenty years ago, Frederick Bernays Wiener not only suggested the application of substantial Constitutional guarantees to military criminal trials through a due process mechanism, but also foresaw that "in years to come, the serviceman shall be recognized as having constitutional rights." Weiner, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 394 (1958).

[56] United States v. Grunden, 2 M.J. 116, 120 (C.M.A. 1977).
[57] *Id.*

[58] Para. 53*e* of the Manual specifically states that for "security or other good reasons the public may be excluded." Further, "All spectators may be excluded from an entire trial, over the accused's objection, only to prevent the disclosure of classified information."

[59] United States v. Grunden, 2 M.J. 116, 120 note 2 (C.M.A. 1977).
[60] *Id.* at 124.

further to enunciate an elaborate procedure wherein the military judge in a preliminary hearing would determine if the prosecution has "met the heavy burden of justifying the imposition of restraints on this constitutional right (footnote omitted)."[61]

First, the military judge must determine whether there has been an adequate demonstration of the classified nature of the matters in issue; second, the "scope of the exclusion of the public" must be determined.[62] As to the latter part of the balancing test announced in *Grunden*, "[t]he prosecution must delineate which witness will testify on classified matters, and what portion of each witness' testimony will actually be devoted to this area."[63]

Such a requirement, of course, contemplates a complicated, bifurcated presentation of evidence wherein the public is shuttled in and out of the courtroom depending upon the witness' specific classified utterances.[64]

Nonetheless, such is deemed necessary by a majority of the Court of Military Appeals, because "[t]he procedure we set forth is to protect an individual's rights under the sixth amendment and to prevent those rights from being ignored on the basis of unthinking acceptance of government claims of need without the appropriate demonstration of that need."[65]

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[61] *Id.* at 122.
[62] *Id.* at 123.
[63] *Id.*

[64] There are inherent difficulties in applying the procedure outlined in Grunden. The Court of Military Appeals places the burden on the military judge to properly exercise discretion to avoid turning his courtroom into a puppet show.

"[C]ontinuity of testimony and the fact that a given witness' testimony deals virtually exclusively with classified materials are certainly factors which could lead to the exclusion of the public from all of a given witness' testimony regardless of the fact that a portion was not concerned with such matters." United States v. Grunden, 2 M.J. 116, 124 note 20 (C.M.A. 1977).

Also, because the exclusion of the public may suggest to court members that, as the testimony is protected it must be true, the military judge must *sua sponte* instruct on the reasons for excluding the public. *Id.* at 124, note 21. *See* Judge Cook's dissenting opinion in Grunden for criticism of both the rationale for the procedure adopted by the majority as well as the drawbacks of the procedure itself.

[65] United States v. Grunden, 2 M.J. 116, 125 note 20 (C.M.A. 1977).

The right to a public trial guaranteed by the sixth amendment is now unquestionably available to military accused.[66] Although the right to a public trial is not an absolute right,[67] a military accused enjoys considerable procedural protection under the holding in *United States v. Grunden*.[68] Unaddressed in *Grunden* are difficult issues involved in the exclusion of the public to protect against the adverse effects of publicity on a fair trial.[69] In addition, problems exist when an accused, as opposed to the government, requests the exclusion of some or all of the public during the taking of testimony to obtain a fair trial.[70] In spite of the many questions which remain as to a military accused's right to public trial, the basic guarantee to such under the sixth amendment is well protected in military criminal trials.

III. RIGHT TO A JURY TRIAL

"[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial (citations omitted)."[71] It is clear from Supreme Court

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[66] United States v. Mercier, 5 M.J. 866 (A.F.C.M.R. 1978).

[67] *See e.g.*, articles and cases cited in note 6, United States v. Grunden, 2 M.J. 116, 120-21 (C.M.A. 1977).

[68] 2 M.J. 116 (C.M.A. 1977).

[69] "Our inquiry deals solely with requests for exclusion by the government and differs from the considerations employed when the defendant requests exclusion of the public in order to insure a fair trial. *See* Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966); Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965)." United States v. Grunden, 2 M.J. 116, 122 note 10 (C.M.A. 1977).

While the first amendment undoubtedly guarantees freedom of the press, it does not guarantee "a constitutional right to special access to information not available to the public generally . . . . " Branzburg v. Hayes, 408 U.S. 655, 684 (1971).

[70] *Compare* United States v. Martinez, 3 M.J. 600 (N.C.M.R. 1977) (refusal to exclude spectators during accused's testimony unreasonably restricted accused's right to present matter in mitigation, and was held error) *with* United States v. Marshall, 3 M.J. 1047 (A.F.C.M.R. 1977) (no error in allowing presence of dependent witness' father over accused's objection).

[71] United States v. Kemp, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973).

decisions[72] that a military accused enjoys no right to a jury trial. Indeed, "[t]he apparently mandatory provision of the Sixth Amendment of trial by jury is, when correctly interpreted, restricted by common law as it existed when the amendment was adopted, its contemporary interpretation, and in the light of the long continued and consistent interpretation thereof."[73] That is, there has never been a right to trial by jury for a military accused,[74] nor is one recognized today.[75]

However, a majority of the Court of Military Appeals has indicated some displeasure with the appointment process[76] for courts-martial membership: "Suffice it to say that court members, hand-picked by the convening authority and of which only four of a required five ordinarily must vote to convict for a valid conviction to result, are a far cry from the jury schedule which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state court systems (citations omitted)."[77] Even given its dissatisfaction with the present system, the Court of Military Appeals appears reluctant to judicially tamper with its mechanisms on the basis of the sixth amendment's jury guarantee, leaving it to Congress to legislatively reform the system.[78]

The recent Supreme Court case of *Ballew v. Georgia*,[79] holding that "in a state trial of a non-petty offense, a jury of less than six

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[72] "The Supreme Court has held, consistently, that one whose status subjects him to trial by court-martial is not entitled to trial by jury." United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411, 419 (1963). *See, e.g., Ex parte* Milligan, 71 U.S. 2 (1866); *Ex parte* Quirin, 317 U.S. 1 (1942); and O'Callahan v. Parker, 395 U.S. 258 (1969).

[73] United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411, 421-22 (1963).
[74] *See* Weiner, *supra* note 55.

[75] *See e.g.*, United States v. Rice, 3 M.J. 1004 (N.C.M.R. 1977). "The Supreme Court and virtually everyone else agree that the right to a trial by petty jury is excluded 'by necessary implication.'" J. Bishop, Justice Under Fire 140 (1974).

[76] *See* Article 25, U.C.M.J., 18 U.S.C. § 825. For a short discussion of court-martial membership, *see* Byrne, Military Law (2d ed. 1976) at 328-30.
[77] United States v. McCarthy, 2 M.J. 26, 29 note 3 (C.M.A. 1976).

[78] "Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process." *Id.*

[79] 425 U.S. 223 (1978).

persons unconstitutionally deprives a defendant of his sixth and fourteenth amendment rights to a jury trial,"[80] provided renewed opportunity for military appellate courts to review "whether the military jury system as embodied in Article 25, Uniform Code of Military Justice, 10 U.S.C. § 825, offends the Sixth Amendment, whether the Sixth Amendment right to trial by jury applies to the military, and whether constitutionally military juries must reflect a representative cross-section of the military community."[81]

The argument that a court-martial composed of only five members violated a military accused's right to jury under the sixth amendment was first considered in *United States v. Montgomery*[82] and summarily rejected, the Army Court of Military Review finding the *Ballew* decision inapplicable because "the military forces are exempt from those provisions of the Sixth Amendment of the United States Constitution under consideration (citation omitted) . . . . "[83] The Court of Military Appeals has apparently decided not to disturb the well-established principle that the right to jury provision of the sixth amendment has no direct application to courts-martial.[84]

The right to a jury may not apply directly to military criminal trials. However, are the considerations in Ballew, including the requirement for a six-member jury, applicable to courts-martial as a matter of due process of law guaranteed by the fifth amendment?[85] The Court of Military Appeals has applied the fifth amendment's due process protections, to include equal protection of the laws, to military criminal trials.[86]

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[80] Bebie, *Minimum Number of Jurors*, 16 Am. Crim. L. Rev. 79 (1978) at 79.
[81] United States v. McCarthy, 2 M.J. 26, 29 note 3 (C.M.A. 1976).
[82] 5 M.J. 832 (A.C.M.R. 1978).
[83] *Id.* at 834.

[84] The Court of Military Appeals initially granted a petition for review on the issue of whether a military accused's "fifth and sixth amendment constitutional rights were violated when his jury on findings and sentencing consisted of only five members and the maximum sentence which he could receive was in excess of six months confinement." United States v. Lamela, 6 C.M.R. 11 (C.M.A. 1978). Later the grant of review on this issue was vacated. United States v. Lamela, 6 C.M.R. 32 (C.M.A. 1978).

[85] The fifth amendment provides in pertinent part that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . , " U.S. Const. amend. V.

[86] *See* United States v. Courtney, 1 M.J. 438 (C.M.A. 1976). In this case, arbitrary prosecution under one of two equally applicable provisions of the U.C.M.J. with

In *United States v. Wolff*,[87] it was urged that Article 16, U.C.M.J.,[88] requiring only five members on a general court-martial, is violative of equal protection considerations of the fifth amendment's due process clause. *Ballew v. Georgia*[89] held, in effect, that "the quality of justice provided by group deliberations decreases as the size of the group is reduced, to the point that the product delivered by groups of less than six is unacceptably poor."[90] Therefore, if a military accused is tried by a five-member court-martial, while others are tried by courts-martial composed of six or more members, that accused arguably has not received equal protection of the laws.

The Navy Court of Military Review in *Wolff* found this argument unconvincing. The data in *Ballew* to support the premise was considered inapposite. That is, courts-martial are not randomly composed to represent a cross-section of the community, but rather are "deliberately chosen on the basis of who is best qualified to sit as a court member."[91] The Navy Court of Review thus held that the only due process to which a military accused is entitled is that which Congress enacted in the U.C.M.J., rejecting the suggestion that the *Ballew* rational posed a genuine problem of due process *viz-a-viz* courts-martial.[92]

The right to a jury trial is perhaps the one clause of the sixth amendment which historically has had no application to military criminal trials. That "[t]he realities of modern criminal prosecution have compelled the highest court of the land to broadly construe the guarantees of the Sixth Amendment,"[93] appears not to have affected that precedent to any appreciable extent.

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greatly disparate maximum punishments was held violative of equal protection under the fifth amendment's due process clause.

[87] 5 M.J. 923 (N.C.M.R. 1978).
[88] 18 U.S.C. § 816 (1976).
[89] 425 U.S. 223 (1978).
[90] United States v. Wolff, 5 M.J. 923, 925 (N.C.M.R. 1978).
[91] *Id.*

[92] *Id.* Also, "[W]e do not believe that since the number of members is variable, the result is discrimination that is so unjustifiable as to be violative of due process." United States v. Montogomery, 5 M.J. 832, 834 (A.C.M.R. 1978).

[93] United States v. Jackson, 5 M.J. 223, 224 (C.M.A. 1978).

IV. THE RIGHT TO BE INFORMED OF THE ACCUSATION

"The provision of the Sixth Amendment giving the accused the right 'to be informed of the nature and cause of the accusation' was designed to ameliorate the common-law rule which . . . denied the prisoner any right to learn the terms of the indictment until it was read over to him slowly at the trial."[94]

Inasmuch as "the Uniform Code itself requires courts-martial to afford most of the protections the accused would have under the Constitution,"[95] it is not surprising to discover that in military criminal trials "the person accused shall be informed of the charges against him as soon as practical."[96]

The U.C.M.J. right to be informed of the charges was initially considered by the Court of Military Appeals as one of the "rights which parallel those accorded to defendants in civilian courts."[97] Thus, the right to be informed of the charges was considered to be a fundamental part of court-martial procedure which "presupposes the existence and application of the constitutional right."[98] Article 30*b*, U.C.M.J., has been held as "embodying, in substance, the provisions of the Sixth Amendment of the Federal Constitution that 'in all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation' (citations omitted)."[99]

Because of statutory[100] and other[101] protections which greatly expand a military accused's right of notice there is a paucity of mili-

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[94] Wiener, *supra* note 55, at 281.
[95] J. Bishop, *supra* note 75, at 137.
[96] Article 30*b*, U.C.M.J., 10 U.S.C. § 830(b) (1976).
[97] United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951).
[98] J. Snedeker, Military justice Under the Uniform Code 448, note 30 (1953).
[99] United States v. Little, 5 C.M.R. 382, 389 (A.F.B.R. 1952).

[100] Article 10, U.C.M.J., provides that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused . . . . " 10 U.S.C. § 810 (1976).

In addition, article 31(b), U.C.M.J., in part provides, "[N]o person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation . . . . " 10 U.S.C. § 831(b) (1970). Also, article 35, U.C.M.J., provides that "[T]he trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had." 10 U.S.C. § 835 (1970).

[101] The Manual gives emphasis to the basic notice requirements in the U.C.M.J. Paragraph 32(f)(1), MCM, *supra* note 29, states, "[B]efore forwarding the

tary cases which concern failure to advise the accused of the nature of the accusation.[102] It is, nonetheless, quite clear that a military accused does enjoy the right to be informed of the sixth amendment through statutory implementation or otherwise.

V. CONFRONTATION

A. INTRODUCTION

An accused's right to "be confronted with the witnesses against him"[103] has a significant history of constitutional interpretation.[104] Today the right of confrontation has developed into a multifaceted guarantee of criminal due process,[105] which extends from the basic

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charges, the immediate commander will inform the accused of the charges against him (arts. 10, 30(b)) and complete and sign the certificate to that effect on the charge sheet." Paragraph 33(c), MCM, *supra* note 29, reiterates this requirement for use if "it appears that the accused has not been advised of the charges against him."

Note that the failure to comply with these provisions, however, is waived by the accused's failure to object at trial. *See* United States v. Moore, 6 M.J. 644 (N.C.M.R. 1978) (charge sheet did not reflect notice to accused, but no prejudice because the accused in fact was served with a copy of the charge sheet well before trial.).

[102] *See* United States v. Mosby, et al., 23 C.M.R. 425 (A.B.R. 1956) (finding of guilty concerning offense not included in charged offense violated article 30 and other U.C.M.J. provisions), and United States v. Bruce, 26 C.M.R. 809 (C.G.B.R. 1958). The Coast Guard Board of Review noted that an accused may be "informed" of the charge as required by article 10, U.C.M.J., "merely by reading the charge to him, or by giving him a copy or by telling him generally of the charge."

[103] U.S. Const. amend VI.

[104] In Mattox v. United States, 156 U.S. 237 (1895), the Supreme Court applied the sixth amendment confrontation clause to federal prosecutions, emphasizing that it means that an accused should be able to see his or her accusers face-to-face and subject them to cross-examination. However, it was not until Pointer v. Texas, 380 U.S. 400 (1965), that the Supreme Court extended the sixth amendment confrontation clause to the states as part of due process.

For an excellent analysis of the confrontation and compulsory process guarantees of the sixth amendment, *see* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).

[105] In United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951), the Court of Military Appeals made it clear that a military accused enjoyed as a matter of military due process the right "to be confronted by witnesses against him; [and] to cross-examine witnesses for the government." *Id.* at 77.

right of an accused to be present in the courtroom[106] to a paramount right to cross-examine government witnesses.[107]

Nonetheless, there remain many unresolved confrontation issues. For example, concerning the use of out-of-court statements, the Supreme Court has generated some confusion with its decisions in *California v. Green*[108] and *Dutton v. Evans*.[109] That is, it is uncertain what confrontation standards should apply to the out-of-court statements of an absent witness.[110] Nonetheless, the Court of Military Appeals has manifested a construction of the right of confrontation which leaves little doubt as to its meaningful place in military criminal trials. In *United States v. Jacoby*,[111] the Court of Military Appeals held that a military accused should have an opportunity to be present with counsel at the taking of depositions, in that such "substantially affords him the right of confrontation guaranteed by the Sixth Amendment."[112] In so holding, the court overruled its own precedent to the contrary,[113] and now a military accused and counsel "shall be present at the taking of any deposition unless the accused consents to the taking of the deposition in the absence of himself, his counsel, or both."[114]

Indeed, the Court of Military Appeals has also held that "the right of confrontation as embodied in military due process requires

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[106] Illinois v. Allen, 397 U.S. 337 (1970); United States v. Cook, 20 C.M.A. 504, 43 C.M.R. 344 (1971). Of course, an accused may voluntarily waive his constitutional right to be present. MCM, *supra* note 29, para. 11c. *See* United States v. Peebles, 2 M.J. 404 (A.C.M.R. 1975).

[107] Davis v. Alaska, 415 U.S. 308 (1974); *see* United States v. Conley, 4 M.J. 327 (C.M.A. 1978), wherein the refusal of a military trial judge with expertise as to the evidence before him to recuse himself "flagrantly ignores his [the accused's] right to confront the witnesses against him (footnote omitted)." *Id.* at 330.

[108] 399 U.S. 149 (1970) (admission of hearsay statement does not *per se* violate confrontation clause).
[109] 400 U.S. 74 (1970) (confrontation clause applies where heresay declarant becomes accuser).

[110] For a proposed solution to the problems of admissibility of out-of-court statements *viz-a-viz* the confrontation clause, *see* Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 Tex. L. Rev. 151 (1978).

[111] 11 C.M.A. 428, 29 C.M.R. 244 (1960).
[112] *Id.* at 249.
[113] United States v. Parrish, 7 C.M.A. 337, 22 C.M.R. 127 (1956), and United States v. Sutton, 3 C.M.A. 220, 11 C.M.R. 220 (1953).
[114] MCM, *supra* note 29, para. 117*b*(2); *see also* para. 145*a* of the Manual.

that actual unavailability be established before a deposition of a serviceman is admitted into evidence."[115] This negates the "one hundred mile clause" of Article 49*d*(1), U.C.M.J.,[116] as a *per se* basis for admission of a deposition.

The admissiblity of former testimony is likewise conditioned upon considerations of confrontation, so that the accused must have been afforded an opportunity to have counsel "and to confront and cross-examine the witness . . . ."[117] Again, actual unavailability must be established before former testimony is admitted against a military accused,[118] perhaps a stricter requirement than that enunciated by the Supreme Court.[119]

It may be fairly stated that a military accused has enjoyed full benefit of the protection of the sixth amendment, insofar as confrontation in the courtroom is concerned, whether in terms of cross-examination or of the evidentiary requirements as to deponents and hearsay declarants.

B. EXTENDED RIGHTS OF CONFRONTATION

1. Pretrial Confrontation

"The right to confrontation is basically a trial right."[120] Notwithstanding this basic principle, the Court of Military Appeals has

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[115] United States v. Gaines, 20 C.M.A. 557, 43 C.M.R. 397 (1971); United States v. Davis, 19 C.M.A. 217, 224, 41 C.M.R. 217, 224 (1970); *cf.* United States v. Mohr, 21 C.M.A. 360, 45 C.M.R. 134 (1972).

[116] 10 U.S.C. § 849*d*(1) (1976). This provision on its face makes admissible depositions when a witness is more than 100 miles from the place of trial. For a general discussion of depositions in military criminal law practice, *see* Dep't of Army, Pamphlet No. 27-22, Military Criminal Law Evidence, ch. 22 (1 Aug. 1975) [hereinafter cited as DA Pam 27-22].

[117] MCM, *supra* note 29 at para. 145*b*; *see* United States v. Burrow, 16 C.M.A. 94, 36 C.M.R. 250 (1956).

[118] United States v. Obligacion, 17 C.M.A. 162, 37 C.M.R. 300 (1967). For a general discussion of former testimony in military criminal law, *see* DA Pam 27-22, *supra* note 116, at ch. 23.

[119] In Mancusi v. Stubbs, 408 U.S. 204 (1972), the Supreme Court held that proof of a foreign residence was adequate to show unavailability in the absence of effective statutory process. *Mancusi*, however, does not change the strict showing of unavailability required in military cases. *See* United States v. Chambers, 47 C.M.R. 549 (A.F.C.M.R. 1973).

[120] Barber v. Page, 390 U.S. 719, 725 (1968).

articulated a right of confrontation and cross-examination at the pretrial stages of a case.[121] That is, a majority of the Court of Military Appeals has held that, in order for the statutory requirement for a pretrial investigation[122] to be properly met, it is necessary that an accused be afforded an opportunity to confront and cross-examine available adversary witnesses.

As to what adversary witnesses must be present for cross-examination during an Article 32, U.C.M.J.,[123] investigation, the Court of Military Appeals has devised a balancing test: "The significance of the witness' testimony must be weighed against the relative difficulty and expense of obtaining the witness' presence at the investigation."[124] Thus, in *United States v. Ledbetter*,[125] the failure of a trial judge to grant a motion "to reopen the investigation and to order the live appearance of the Government witness"[126] was prejudicial error when the witness was in the service and subject to military orders.

The opportunity for confrontation at a pretrial stage of a general court-martial also extends to a military accused who was denied an opportunity to confront a key adversary witness prior to trial at either the pretrial investigation or by way of deposition.[127] In *United States v. Chestnut*[128] the accused was forced by the trial judge "to proceed to trial in a rape case without having examined the prosecutrix under oath prior to trial,"[129] and this constituted reversible error in spite of the fact that the accused did interview the witness prior to trial and confronted her at trial.[130]

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[121] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). The Court of Military Appeals is careful to note that "the statutory standard of confrontation for Article 32 investigations is different from the constitutional standard applicable to criminal trials." United States v. Chuculate, 5 M.J. 143, 145 note 7 (C.M.A. 1978).

[122] Article 32, U.M.C.J., mandates a thorough and impartial investigation as a prerequisite to trial by general court-martial. The accused is entitled to counsel at the investigation and shall have a full opportunity to cross-examine available adversary witnesses. 10 U.S.C. § 832 (1970).

[123] *Id.*

[124] United States v. Ledbetter, *supra* note 122, at 42.
[125] 2 M.J. 37 (C.M.A. 1976).
[126] *Id.* at 44.
[127] United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976).
[128] *Id.*
[129] *Id.* at 85.

[130] "Ironically, Miss Link [the witness] could not identify Sergeant Chestnut as

The *Ledbetter-Chestnut* rule as to pretrial confrontation has even been applied to the circumstance where a witness was "unavailable for full cross-examination at the pretrial investigation due to his refusal to answer certain questions on the grounds of self-incrimination"[131] but later would testify freely at trial.

The right of pretrial confrontation is a unique feature of statutory investigatory requirements,[132] but a failure to assert the right by way of a request to depose civilian witnesses before trial[133] or a demand for a new investigation at trial in the case of an available military witness[134] results in "the merger with the cross-examination rights at trial and the absence of any perceptible adverse effect on appellant's rights removes any basis for reversal."[135]

2. Confronting the Expert

In *United States v. Evans*[136] the Court of Military Appeals held that a laboratory report qualified for admission under the business entry exception to the hearsay rule, thereby permitting the proof of substances as illegal drugs without the necessity of initially calling to testify the expert who prepared the report. In so holding, however, the Court observed that an accused does not "forgo the right to attack the report's accuracy."[137] In other words, the accused may request the witness "for the purpose of challenging the procedure he used or his competency to make the examination. . . . "[138] In so doing, "as the business entry is admissible without the in-person

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her assailant at trial." United States v. Chestnut, 2 M.J. 85, 85 note 1 (C.M.A. 1976).

On retrial, Sergeant Chestnut was duly convicted of rape. At his new pretrial investigation, former testimony of key witnesses was considered in lieu of live testimony. At trial Sergeant Chestnut demanded a new investigation on the basis he had been denied pretrail confrontation rights. The trial judge denied him such and was sustained on appeal because the witness had been confronted by the accused and his counsel at the initial trial. United States v. Chestnut, 4 M.J. 642 (A.F.C.M.R. 1977).

[131] United States v. Jackson, 3 M.J. 597, 599 (N.C.M.R. 1977).
[132] *See* note 123, *supra*.
[133] United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978).
[134] United States v. Cruz, 5 M.J. 286 (C.M.A. 1978).
[135] *Id.* at 289.
[136] 21 C.M.A. 579, 45 C.M.R. 353 (1972).
[137] *Id.* at 356.
[138] United States v. Miller, 23 C.M.A. 247, 250, 49 C.M.R. 380, 383 (1974).

testimony of the declarant, the accused can assert his right to cross-examination. . . "[139]

The *Evans* decision did not address the question of an accused's constitutional right to confrontation. While subsequent decisions by the Army Court of Military Review have sustained convictions on the basis of the laboratory reports without the presence of the preparing expert,[140] the issue is now before the Court of Military Appeals.[141]

In *California v. Green*[142] the Supreme Court observed that the confrontation clause of the sixth amendment provides more protection than hearsay rules—"we have more than once found a violation of confrontation values even though the statements were admitted under an arguably recognized hearsay exception (citations omitted)."[143] Of course, under *Evans* an accused may always insist on the presence of the witness for cross-examination, thereby securing essential confrontation even when a laboratory report is admitted as an exception to the hearsay rule.

It remains to be seen whether the Court of Military Appeals will require the presence of an expert as necessary to confrontation[144] or whether the failure to request the presence of the expert for cross-examination will be considered a waiver.[145] It is submitted that the present *Evans* requirements are adequate and "would neither constitutionalize the hearsay exceptions nor impair their usefulness."[146]

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[139] *Id.*

[140] *See, e.g.*, United States v. Burrell, 5 M.J. 617 (A.C.M.R. 1978), and United States v. Watkins, 5 M.J. 612 (A.C.M.R. 1978).

[141] *See, e.g.*, United States v. White, 6 M.J. 133 (C.M.A. 1978). In this case the Court of Military Appeals granted review on two issues raised by appellate defense counsel, one of which was as follows: "Absent the testimony of the examining chemist or the stipulation of the parties as to the identity of the charged substances, appellant was denied his sixth amendment right of confrontation by the proof of the offense by the laboratory report alone." *Id.* at 134.

[142] 399 U.S. 149 (1970).

[143] *Id.* at 156.

[144] The Supreme Court of Tennessee would ordinarily require the presence of the expert. *See* State v. Henderson, 554 S.W.2d 117 (Tenn. 1977).

[145] It is well established that an accused may waive his or her right of confrontation. *See, e.g.*, Drope v. Missouri, 420 U.S. 162 (1975).

[146] Graham, *supra* note 110, at 205.

3. Other Confrontation Considerations

In *Chambers v. Mississippi*,[147] the Supreme Court held that an evidentiary rule barring the cross-examination of a defense witness, McDonald, who had confessed to the crime charged against the accused and then repudiated the confession, together with the exclusion of hearsay testimony of other witnesses to whom McDonald had confessed, resulted in a violation of due process.

While the decision rests upon due process aspects of fair trial, these aspects are essentially those of confrontation and due process. As to confrontation, the Supreme Court found the curtailment of cross-examination of McDonald violative of the accused's confrontation right.[148]

Perhaps more important, the accused was denied compulsory process because he was prevented from "using reasonable methods of examination to develop evidence in his defense from a witness in his favor (footnote omitted)."[149] Indeed, in *United States v. Johnson*, [150] the Court of Military Appeals focuses on the latter to reverse a conviction obtained after the exclusion of a reliable third party confession offered by the accused.

What is significant in the *Chambers* decision of the Supreme Court, and in the *Johnson* decision of the Court of Military Appeals, is the specific incorporation of sixth amendment confrontation and compulsory process rights into due process considerations of fair trial.[151]

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[147] 410 U.S. 284 (1973).
[148] *Id.* at 295.

[149] Westen, *supra* note 104, at 613. Chambers v. Mississippi, 410 U.S. 284 (1973), has been construed as establishing a constitutional right to present defense evidence. *See* Imwinkelreid, *Chambers v. Mississippi, — U.S. —— (1973), The Constitutional Right to Present Defense Evidence*, 62 Mil. L. Rev. 225 (1973).

[150] 3 M.J. 143 (C.M.A. 1977).

[151] A fair trial should afford an accused at least "a right to examine the witnesses against him, to offer testimony and to be represented by counsel." *In re* Oliver, 333 U.S. 257, 273 (1948).

VI. COMPULSORY PROCESS

A. INTRODUCTION

The compulsory process provision of the sixth amendment did not enjoy any special importance as an element of fair criminal proceedings until 1967.[152] That year, in *Washington v. Texas*,[153] the Supreme Court brought "compulsory process for obtaining witnesses in his favor"[154] to life as a "fundamental element of due process"[155] for an accused. In that case an accused was prevented from presenting testimony in his defense from an already convicted accomplice because a state statute made the latter incompetent to testify.[156]

The Supreme Court held the statute unconstitutional under the compulsory process clause of the sixth amendment, observing that the "right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."[157]

The year 1967 not only marks the moment when compulsory process was recognized as a vital feature of due process and applied to the states.[158] It was also the year that the Court of Military Appeals specially recognized the application of the sixth amendment compulsory process clause to military criminal trials. In *United States v. Manos*, [159] the Court of Military Appeals rejected the contention "that the Sixth Amendment, United States Constitution, right to have compulsory process for the accused to obtain witnesses in his favor does not apply in trials by court-martial."[160]

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[152] For an excellent discussion of the history and constitutional development of compulsory process, *see* Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974).

[153] 388 U.S. 14 (1967).
[154] U.S. Const. amend. VI.
[155] Washington v. Texas, 388 U.S. 14, 19 (1967).
[156] *Id.* at 16, note 4.
[157] *Id.* at 19.
[158] *Id.*
[159] 17 C.M.A. 10, 37 C.M.R. 274 (1967).
[160] *Id.* at 278.

Of course, a military accused is statutorily guaranteed compulsory process under Article 46, U.C.M.J.,[161] but the Court of Military Appeals also makes it clear that under the sixth amendment clause a military accused "may not be deprived of the right to summon to his aid witnesses who it is believed may offer proof to negate the Government's evidence or to support the defense."[162]

B. MILITARY COMPULSORY PROCESS

Given the fact that a military accused's right "to compel the attendance of witnesses who, it is believed, may offer proof to negate the Government's evidence or to support the defense is one constitutionally and statutorily protected,"[163] what, if any, constraints are there with respect to compulsory process?

Initially, if a court-martial is without the requisite statutory authority to compel the attendance of an important witness, as may occur overseas where process is lacking, then there is "no constitutional alternative except to abate the proceedings."[164] Also, a military accused's right of compulsory process "is not absolute in that it involves consideration of relevancy and materiality of the expected testimony (citations omitted)."[165]

Indeed, absent an averment of materiality in the request for a witness, the Court of Military Appeals held in *United States v.*

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[161] Article 46, U.C.M.J., provides: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealth, and possessions." 10 U.S.C. § 846 (1976).

[162] United States v. Sweeney, 14 C.M.A. 559, 602, 34 C.M.R. 379, 382 (1964).
[163] United States v. Iturralde-Aponte, 1 M.J. 196, 198 (C.M.A. 1975).

[164] United States v. Daniels, 23 C.M.A. 94, 96, 48 C.M.R. 655, 657 (1974). For example, there appears "no specific statutory or regulatory authority which grants United States military authorities, acting on their own, the power to summon a civilian residing in the United States and compel his attendance at a trial in a foreign country." United States v. Boone, 49 C.M.R. 709 (A.C.M.R. 709).

[165] United States v. Carpenter, 1 M.J. 384, 385 (C.M.A. 1976).

Lucas[166] that "no violation of the appellant's right to compulsory process to secure witnesses can reasonably be said to have occurred."[167] Once materiality is demonstrated the trial judge in his discretion determines "if the actual presence of the witness is required or whether justice may be guaranteed by some judicially alternate form of testimony."[168] Therefore, if "in the sound discretion of the trial judge, the testimony of that [requested] witness would be merely cumulative to the testimony of other defense witnesses,"[169] then the live presence of the witness is not required.

This reflects only that merely cumulative testimony would be in the final analysis irrelevant, and there is "*no* constitutional right to the testimony of a witness which would *not* be relevant, and, therefore, it is not a violation of a defendant's right to due process to deny him such a witness."[170]

Although the Court of Military Appeals has thus recognized certain limitations of a military accused's right of compulsory process, it has also acknowledged that ordinarily a military accused's right to the production of favorable witnesses should be generously construed. Merely because a witness' testimony is repetitious does not make it *per se* cumulative; the trial judge should exercise his discretion to determine whether there is "an important impact to be expected from some repetitive testimony,"[171] and therefore necessary to a full and fair trial. Also, "once the testimony of witnesses has been found by the judge to be merely cumulative and once the judge has ruled how many of these witnesses will be permitted to testify pursuant to government-paid process, only the defense may properly decide which of these witnesses will be utilized."[172] A military accused is entitled to the production of witnesses in his or her favor

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[166] 5 M.J. 167 (C.M.A. 1978).
[167] *Id.* at 172.

[168] United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978). In United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976), Judge Cook in the majority opinion stated, "once materiality has been shown the Government must either produce the witness or abate the proceedings." *Id.* at 385-86. However, in subsequent cases he retreats from the broad implications of his words and finds that "[m]ateriality alone does not establish entitlement to the presence of the witnesses at trial." United States v. Tangpuz, 5 M.J. 426, 428 (C.M.A. 1978).

[169] United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977).
[170] *Id.* at 242.
[171] *Id.* at 243 note 8.
[172] *Id.* at 243 note 8.

not only on the issue of guilt or innocence,[173] but also on motions[174] and during presentencing presentations,[175] "military necessity" notwithstanding.[176]

The procedures for requesting a witness are set out in the Manual,[177] and while the Navy Court of Military Review has indicated that strict compliance with these requirements is necessary,[178] a reasonable demonstration of the purpose for calling the witness may be sufficient.[179] In any event, the Court of Military Appeals has questioned whether the "Manual provision improperly discriminates against an accused because it imposes burdens in the procurement of a defense witness that are not imposed on the Government,"[180]

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[173] United States v. Jouan, 3 M.J. 136 (C.M.A. 1977) (accused may not be compelled to accept substitute witness of lesser impact because of military convenience). An accused is entitled not only to material witnesses whose testimony supports the defense but also to witnesses whose testimony impeaches the credibility of the prosecution theory. United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975) In this case the court found it error to deny a request for a defense witness whose testimony would support the accused's claim of self-defense by demonstrating that the victim was the likely aggressor in a murder case.

[174] United States v. Krejce, 5 M.J. 701 (N.C.M.R. 1978) (jurisdiction motion), and United States v. Daly, 47 C.M.R. 365 (A.C.M.R. 1973) (command influence motion).

[175] United States v. Willis, 3 M.J. 94 (C.M.A. 1977). The court found that a request for presentencing witnesses at rehearing was improperly denied.

[176] United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976). It was here found error to deny production of character witness on the basis of military necessity.

[177] Paragraph 115*a*, MCM, *supra* note 29, requires that an accused submit a written request for a witness' personal appearance which contains a synopsis of the witness' expected testimony, a statement of the full reasons necessitating the witness' personal appearance, and any other matter showing that such is necessary to the ends of justice.

[178] United States v. Vietor, 3 M.J. 952 (N.C.M.R. 1977). This case concerned a request for production of an expert witness for cross-examination.

[179] United States v. Niederkorn, 50 C.M.R. 341 (A.C.M.R. 1975) (request for production of expert for cross-examination); *see also* United States v. Johnson, 3 M.J. 772 (A.C.M.R. 1977) (request for production of expert for cross-examination).

Arguably, these cases, as well as Vietor, note 178, *supra*, involve confrontation more than compulsory process. However, "the outcome should be identical whether the accused's sixth amendment claim arises in the context of his right to be confronted with the witnesses against him or his right to obtain witnesses in his favor." Western, *supra* note 104, at 628.

[180] United States v. Arias, 3 M.J. 436, 438 (C.M.A. 1977). *See* note 178, *supra*.

namely, an accused must initially secure his witnesses by approval of the prosecution. This requirement arguably conflicts with the equal opportunity to obtain witnesses prescribed by Article 46, U.C.M.J.[181]

All in all, a military accused enjoys the full protection of the compulsory process clause of the sixth amendment, and benefits further from statutory requirements which provide witnesses in his favor at no expense. While it is true that the production of defense witnesses is perhaps procedurally inconvenient, subject to the discretion of the trial judge, and ultimately tested for prejudice,[182] a military accused does have compulsory process at all stages of a court-martial, which affords a full opportunity to present a defense.

VII. RIGHT TO ASSISTANCE OF COUNSEL

A. THE SIXTH AMENDMENT'S SCOPE: TURNER'S CONSTITUTIONAL SWEEP

The right to counsel "is extended to the military accused both by the sixth amendment to the Constitution and the Uniform Code of Military Justice."[183] And it appears that a majority of the Court of Military Appeals has adopted views favoring a constitutional right to counsel which not only inures to a military accused, but one which may also be asserted *sua sponte* by a counsel who generally represents the accused.

Such is the import of *United States v. Turner*, [184] a case which addresses a military accused's sixth amendment right to counsel

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[181] 10 U.S.C. § 846 (1976). *See* note 162, *supra*.

[182] Erroneous denial of a defense request for a material witness "is not automatic ground for reversal of an otherwise valid conviction; it must appear that the denial resulted in a fair risk of prejudice to the accused." United States v. Christian, 6 M.J. 624, 627 (A.C.M.R. 1978). *See also* United States v. Lucas, 5 M.J. 167 (C.M.A. 1978).

[183] United States v. Annis, 5 M.J. 351 (C.M.A. 1978).

[184] 5 M.J. 148 (C.M.A. 1978). The majority of the Court of Military Appeals adopted the reasoning of Judge Costello of the Army Court of Military Review in deciding the issue of whether there was "a denial of appellant's Sixth Amendment rights. . . . " United States v. Turner, 5 M.J. 148, 149 (C.M.A. 1978). Judge Costello's opinion is found in United States v. Turner, 3 M.J. 566, 572-75 (A.C.M.R. 1977).

prior to an interrogation. An examination of the approach taken by the current Court of Military Appeals in *Turner* illustrates the extent to which one's constitutional right to counsel applies in military criminal law practice.

The accused in *Turner* had been released from confinement by civilian authorities and was delivered to an Army Criminal Investigation Division Office for questioning about offenses for which he was ultimately convicted. While the accused was in an interrogation room, a civilian attorney confronted the investigating agent and advised the latter that he represented the accused generally and asked to speak to him. This request was denied, and the accused was not informed of the attorney's presence. "After an advisement of rights under Article 31, U.C.M.J. and *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967),"[185] the accused stated that he did not

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[185] *Id.* at 149. Article 31, U.C.M.J. provides:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

10 U.S.C. § 831 (1976).

"If the accused was informed of the offense of which he was suspected, of his right to make no statement, and that any statement that he did make could be used against him, Article 31 was generally complied with." DA Pam 27-22, *supra* note 116, at 32-10.

The requirement that an accused undergoing custodial interrogation must also be informed that he has a right to an attorney was made applicable to military criminal law by United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967). This case applied to military criminal law the constitutional right to counsel at the stage of custodial interrogation as mandated by the Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966).

In addition, the Manual specifically requires that an accused in custody be advised of his right to counsel. *See* para. 140*a*, Manual for Courts-Martial, 1969 (Rev. ed.).

want an attorney and executed a valid waiver of rights. The accused then gave a confession.

The admissibility of the confession was framed by the Court of Military Appeals as a sixth amendment right to counsel issue. That is, "was the denial to civilian counsel of the opportunity to converse with his client prior to the first interrogation a denial of appellant's Sixth Amendment rights, rendering the first confession inadmissible?"[186]

A majority of the Court of Military Appeals answered this question affirmatively; however, the circumstances in *Turner* seem to weigh against this conclusion. As acknowledged in the opinion adopted by the majority of the Court of Military Appeals,[187] the accused in *Turner* was not at a critical stage[188] in the criminal process wherein counsel would be required. That is, the accused was not actually under interrogation when the civilian attorney appeared and "[a]t that point a suspect has no right to warnings, nor must the Government proffer appointed counsel."[189]

What, then, in the circumstances of *Turner* gives rise to a sixth amendment right to counsel? Apparently the request by the civilian attorney who generally represented the accused is to be equated to a request by the accused himself to see counsel,[190] and "if the suspect asks for his own retained counsel and is refused he has been denied his Sixth Amendment rights."[191]

The decision in *Turner* can be criticized on at least two grounds. First, the accused "must have had counsel at the time the police

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[186] *Id.*

[187] *See* note 185, *supra*.

[188] "The doctrine of consultation at 'critical' stages has been applied to proceedings where important rights could be lost by an unknowing defendant, absent the assistance of knowledgeable counsel." United States v. Jackson, 5 M.J. 223, 225 (C.M.A. 1978).

[189] United States v. Turner, 3 M.J. 570, 575 (A.C.M.R. 1977), adopted by the Court of Military Appeals in United States v. Turner, 5 M.J. 148, 149 (C.M.A. 1978).

[190] "There is no difference between counsel Lovelace's assertion of his client's right to counsel and a similar assertion by appellant himself; it is counsel's right and duty to act for his client." *Id.* at 573.

[191] *Id.* at 575.

refusal occurred . . . and attorney Lovelace's statement that he represented appellant and wished to act for him made him appellant's counsel at that time and place."[192]

While it is clear that a right to counsel does not depend upon an accused's request for such,[193] it is difficult to discern how counsel in *Turner* could claim a sufficient attorney-client relationship to act on behalf of the accused in claiming a personal right to counsel.[194] It is hard to "see that the lawyer-client relationship between appellant and counsel had at that time been established for the military criminal investigation at issue."[195]

The linchpin in the *Turner* decision is the existence of an attorney-client relationship which could trigger a denial of the sixth amendment right to counsel when either asserted by the accused or his counsel in the former's behalf. There is minimal evidence that either the accused or the civilian counsel in *Turner* had manifested any relationship with respect to the detention of the accused as a criminal suspect prior to interrogation.[196] Therefore, it is question-

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[192] *Id.* at 573.

[193] *See, e.g.*, Carnely v. Cochran, 396 U.S. 506 (1962). Here the Supreme Court found that the presumption of waiver at a state trial cannot operate to deprive an accused of the right to counsel, because the right does not depend upon request by the accused.

[194] "Constitutional rights are personal . . . ." Brewer v. Williams, 430 U.S. 387, 419 (1977) (Burger, C.J., dissenting); *see also* State v. Johns, 185 Neb. 590, 177 N.W.2d 580, 586 (1970) (Newton, J., dissenting).

[195] United States v. Turner, 3 M.J. 570, 571 (A.C.M.R. 1973), *reversed*, 5 M.J. 148 (C.M.A. 1977). In its majority opinion, the Army Court of Military Review decided the case on statutory, as opposed to sixth amendment rights to counsel. *See* discussion in part VII, section B, of this article, *infra*.

[196] The civilian counsel in *Turner*, a Mr. Lovelace, upon learning of the accused's presence, informed those holding the accused that "he represented appellant on some other matters and considered himself counsel for the appellant generally. . . ." United States v. Turner, 3 M.J. 570, 571 (A.C.M.R. 1973), *reversed*, 5 M.J. 148 (C.M.A. 1977).

Indeed, at trial Mr. Lovelace's objection to the admission of the accused's confession, which was obtained in his absence, was that the accused should have been advised in connection with his right to counsel, that Mr. Lovelace was immediately available to act as counsel for him. Such implies that, at the time the accused was given proper warning and interrogated, Mr. Lovelace enjoyed no standing as the accused's counsel in the matter.

The Court of Military Appeals has stated "that acceptance by the accused is an absolute necessity to the establishment of an attorney-client relationship (citation omitted)." United States v. Iverson, 5 M.J. 440, 443 (C.M.A. 1978).

able whether the attorney in *Turner* had any standing to see the accused under the attendant circumstances.[197]

A second problem in *Turner* is the question of whether a constitutional right to counsel could arise prior to the interrogation. As pointed out by Judge Cook in dissent, the opinion adopted by the majority could be considered wrong "because it fails to recognize that the constitutional right to counsel does not arise before formal charges are filed or an adversary judicial proceeding, such as a preliminary hearing or an arraignment, takes place."[198]

Indeed, the Supreme Court has held only that "[O]nce adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." [Emphasis added.][199] Because no "adversary proceedings" had been brought against the accused in *Turner*, perhaps "as far as the constitutional provision for the assistance of counsel is concerned, a custodial interrogation of the kind in issue may be initiated without the presence of a lawyer for the person to be interrogated."[200]

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[197] Judge Costello's opinion in *Turner*, adopted as the *ratio decidendi* by the majority of the Court of Military Appeals, is based primarily upon People v. Donovan, 13 N.Y. 2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963), cited with approval by the Supreme Court in Escobedo v. Illinois, 378 U.S. 478, 487 (1964) and Miranda v. Arizona, 384 U.S. 436, 465 note 35 (1966).

Donovan, it should be noted, is one of a series of New York appellate court decisions which extend the right to counsel in that jurisdiction well beyond sixth amendment requirements. Recently the New York Court of Appeals held that "a criminal defendant under indictment and in custody may not waive his right to counsel unless he does so in the presence of an attorney. . . ." People v. Settles, 24 Cr. L. 2335 (1979).

In *Donovan* the New York Court of Appeals condemned "continued incommunicado interrogation of an accused after he or the lawyer *retained* by him or his family has requested that they be allowed to confer together." [Emphasis added.] *Id.* at 630.

There is little, if any, evidence to suggest that Mr. Lovelace had been retained by the accused or anyone on behalf of the accused to represent the latter as to the matters at hand. Thus, "the agent could properly treat counsel as an interloper and refuse to allow him to attend the interrogation. . . ." United States v. Turner, 5 M.J. 148, 151 (C.M.A. 1978) (Cook, J., dissenting)).

[198] United States v. Turner, 5 M.J. 148, 150 (C.M.A. 1978) (Cook, J., dissenting).
[199] Brewer v. Williams, 430 U.S. 387, 401 (1977).
[200] United States v. Turner, 5 M.J. 148, 150 (C.M.A. 1977) (Cook, J., dissenting).

Even if the majority opinion in *Turner* rests upon less than secure factual and legal underpinnings, its central message is clear: The sixth amendment right to counsel in military criminal trials extends to any circumstance where counsel's presence is necessary so that "the person confronting the puissance of the state will not be forced to stand alone but will be guaranteed his right to a fair trial consistent with the adversary nature of criminal prosecution."[201]

B. THE STATUTORY SCOPE: McOMBER/LOWRY'S STATUTORY SWEEP

As noted, a military accused's right to counsel stems not only from the sixth amendment, but also from statutory authority.[202] In

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[201] United States v. Jackson, 5 M.J. 223, 244 (C.M.A. 1978).

[202] Article 27, U.C.M.J., sets forth the requirements for counsel at courts-martial.

A military accused's statutory right to appointed lawyer-counsel is only absolute in general courts-martial. 10 U.S.C. § 827*b* (1976). In special courts-martial a military accused is entitled to appointed lawyer-counsel except in rare circumstances where physical conditions or military exigencies prevent obtaining qualified counsel. 10 U.S.C. §287*c* (1976). In addition, when a military accused is not represented by lawyer-counsel at a special court-martial, a punitive discharge cannot be adjudged. 10 U.S.C. § 819 (1976).

In both general and special courts-martial a military accused may be represented by individual counsel, a civilian lawyer at no expense to the Government, or a military lawyer if reasonably available, in addition to appointed counsel. 10 U.S.C. § 838 (1070).

There is no statutory provision for counsel in summary courts-martial, and the Supreme Court has held that a military accused has no sixth amendment right to counsel in summary courts-martial because such are not criminal proceedings. Middendorf v. Henry, 425 U.S. 25 (1976). *Middendorf* has been criticized as tending "to obscure the boundaries of constitutional protection afforded members of the armed services and to weaken the impact of the right to counsel afforded all of American civilian society." Note, *Military Justice–Right to Counsel–Servicemen Tried Before Summary Courts-Martial Have No Constitutional Right to Counsel. Middendorf v. Henry, 425 U.S. 26 (1976)*, 54 Tex. L. Rev. 1471, 1487 (1976).

The Court of Military Appeals, of course, defers to the Supreme Court in determining the extent to which military criminal trials are subject to the sixth amendment right to counsel. Nonetheless, the Court of Military Appeals applied *Middendorf* in a manner to narrow the utility of summary courts-martial without

interpreting the scope of Article 27, U.C.M.J.,[203] in providing a right to counsel for military accused the Court of Military Appeals has extended its provisions to hold that "once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders a statement obtained involuntary under Article 31(d) of the Uniform Code."[204] This holding covers the situation where an investigator is on notice of counsel but interrogates the accused on a separate offense which was closely related to the offense for which counsel represents the accused.[205]

As discussed, in *United States v. Turner*,[206] a majority of the Court of Military Appeals held that the sixth amendment right to counsel protected an accused who gave a confession after proper warnings and waiver but in circumstances where a civilian counsel who generally represented him was barred from seeing the accused prior to questioning. Because the Court of Military Appeals' notice to counsel requirement in *United States v. McOmber*[207] and *United States v. Lowry*[208] is predicated "on an accused's statutory right to counsel as set forth in Article 27 and not the Sixth Amendment right,"[209] the accused in Turner could not claim the benefit of that requirement. Nonetheless, the *McOmber/Lowry* rule for military accused gives an extra dimension to the right to counsel as secured by Article 27, U.C.M.J.[210]

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counsel. United States v. Booker, 5 M.J. 238 (C.M.A.); *partially reconsidered*, 5 M.J. 246 (C.M.A.); *originally published at* 3 M.J. 443 (C.M.A.) *as modified at* 4 M.J. 95 (C.M.A. 1977). In the *Booker* case, the court found that summary courts-martial convictions where counsel was not present or not properly waived cannot be used to escalate punishment.

An argument has been advanced that, in spite of *Middendorf*, an opportunity for an Army accused to be represented by counsel at summary courts-martial still exists. *See* Piotrowski, *The Right to Counsel at a Summary Court-Martial*, The Army Lawyer, March 1977, at 12.

[203] 10 U.S.C. § 827 (1976).
[204] United States v. McOmber, 1 M.J. 380, 383 (C.M.A. 1976).
[205] United States v. Lowry, 2 M.J. 55 (C.M.A. 1976).
[206] 5 M.J. 148 (C.M.A. 1978), adopting Judge Costello's opinion found in United States v. Turner, 3 M.J. 566 (A.C.M.R. 1977).
[207] 1 M.J. 380 (C.M.A. 1976).
[208] 2 M.J. 55 (C.M.A. 1976).
[209] *Id.* at 60.
[210] 10 U.S.C. § 827 (1976).

C. THE PROBLEM OF WAIVER: TURNER REVISITED

At the same time the Court of Military Appeals in *United States v. Turner*[211] amplified the scope of the sixth amendment's right to counsel in military criminal trials,[212] it identified a basis for waiver of that right. After the accused in *Turner* was first questioned without counsel, he consulted with his attorney. Five days later the accused in *Turner* was again interrogated, and again he properly was advised of his rights and gave a waiver. The investigator, a Mr. Kurtzrock, then took a second statement from the accused.

At trial when asked about the taking of the statement from the accused, the investigator testified that "[H]is answer to me was my lawyer told me not to tell you anything, Mr. Kurtzrock, but I could care less; I'm going to tell you what—I don't care what my lawyer said."[213] In addition, the accused did not request his lawyer's presence when giving the statement.[214] Under these circumstances the Court of Military Appeals held that "an individual, after conference with his attorney, [may] waive his presence at an interrogation."[215]

Thus, the somewhat curious result in *Turner* is that a military accused's right to consult counsel when questioned can be claimed by an attorney generally representing him in the absence of any request by the accused, but when that same attorney advised him not to answer questions the accused may reject that advice without consultation.

Perhaps the most significant recent case concerning waiver of counsel is *United States v. Hill*.[216] In *Hill*, the accused was given proper rights warnings and said that he wanted counsel and wished to make no statement. Thereupon the accused was placed in a detention cell for nine hours and told finally that the investigators had information that he was implicated in the robbery which formed the basis for his ultimate court-martial. At that time the accused said he wanted to talk, so he was again advised of his rights and stated he

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[211] 5 M.J. 148 (C.M.A. 1978).
[212] *See* discussion in part VII, section A, of this article, *infra*.
[213] United States v. Turner, 5 M.J. 148, 149 (C.M.A. 1978).
[214] *Id.*
[215] *Id.*
[216] 5 M.J. 114 (C.M.A. 1978).

no longer wanted counsel. He gave a statement which was admitted over objection at his trial.

The Court of Military Appeals first observed that the accused's initial request for counsel increased the burden of demonstrating a proper waiver of counsel. Examining the evidence in *Hill*, a majority of the Court of Military Appeals found this burden had not been met: "Rather than demonstrating a voluntary relinquishment of his rights, such evidence reflects an erosion of such rights by the government officials involved."[217]

Judge Perry, concurring, identified the eroded rights as Articles 27[218] and 31,[219] U.C.M.J., and opined that "once an accused requests counsel during an interview by a law enforcement agent and the interview is terminated therefor, subsequent renewal of that interview is not permissible without the presence of counsel unless properly waived."[220] As to the waiver, Judge Perry apparently contemplates that the interrogator upon being advised that the accused wants counsel, cannot renew questioning "without assuring that the accused has consulted with an attorney and does not desire the presence of that attorney during further interrogation."[221]

The Court of Military Appeals in its recent decisions concerning waiver of one's right to counsel appears to place a heavy burden upon the Government to demonstrate the voluntary nature of the waiver but, once that is shown, to allow the waiver to stand.

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[217] *Id.* at 116.
[218] 10 U.S.C. § 827 (1976).
[219] 10 U.S.C. § 831 (1976).
[220] United States v. Hill, 5 M.J. 114, 16 (C.M.A. 1978).

[221] *Id.* In his dissenting opinion, Chief Judge Fletcher identifies the critical right being waived as that against self-incrimination, relying on the Supreme Court decision in Michigan v. Mosely, 423 U.S. 96 (1975). In that decision the Court held that an accused's "exercise of the right to remain silent at one interrogation does not immunize him from future interrogation." United States v. Collier, 1 M.J. 358, 362 (C.M.A. 1976).

In *Collier* the Court of Military Appeals found an accused's statement inadmissible because the Government failed to sustain its burden in showing such was voluntary. In addition, the Court of Military Appeals found no impairment of an accused's right to counsel when Government agents asked the accused's attorney to talk to him and neither the attorney nor the accused voiced any objection. *Id.* at 364 note 5.

D. POST-TRIAL RIGHTS TO COUNSEL

In 1975 the Court of Military Appeals decided *United States v. Goode*,[222] a case which holds that a copy of the written post-trial review[223] must "be served on counsel for the accused with an opportunity to correct or challenge any matter he deems erroneous, inadequate or misleading, or on which he otherwise wishes to comment."[224]

In addition, the Court of Military Appeals required that proof of such service be made part of the record, and stated that the "failure of counsel for the accused to take advantage of this opportunity within 5 days of said service upon him will normally be deemed a waiver of any error in the review."[225] The waiver doctrine of *Goode* has been strictly applied by the Court of Military Appeals,[226] thereby enhancing the role of counsel in the post-trial review process.

Two years after *Goode*, the Court of Military Appeals elaborated extensively on the role of counsel in the post-trial process. In *United States v. Palenius*,[227] the court found an accused's right to counsel abridged where a trial defense counsel advised the accused to forego appellate representation and that counsel himself did not provide minimum post-trial representation. Such advice was erroneous and the decision by the accused to waive appellate counsel was "a nullity and cannot constitute a waiver of the right to representation by an attorney in his appeal."[228]

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[222] 1 M.J. 3 (C.M.A. 1975).

[223] Article 61, U.C.M.J., provides that a written opinion by the staff judge advocate or legal officer is required for general courts-martial records. 10 U.S.C. § 861 (1976).

[224] United States v. Goode, 1 M.J. 3, 6 (C.M.A. 1975).

[225] *Id.*

[226] *See* United States v. Morrison, 3 M.J. 408 (C.M.A. 1977) and United States v. Barnes, 3 M.J. 406 (C.M.A. 1977). In the latter case the Court of Military Appeals in the face of an apparently deficient review found waiver, but recognized that "a case could arise which involves inadequate representation by counsel where waiver would not be applied. . . . " *Id.* at 407.

Note that the defense counsel must be provided access to the record of trial so that he can meet his post-trial responsibilities. United States v. Cruz, 5 M.J. 286 (C.M.A. 1978).

[227] 2 M.J. 86 (C.M.A. 1977).

[228] *Id.* at 92.

Further, the Court of Military Appeals laid out four specific responsibilities[229] for defense counsel in the post-trial process. First, counsel must advise the accused as to the appellate process and take appropriate action during the intermediate reviews of the case. Second, the accused and any appellate counsel should be informed by trial defense counsel of the specific grounds or issues on appeal. Third, counsel should "remain attentive to the needs of his client by rendering him such advice and assistance as the exigencies of the particular case might require."[230] Finally, counsel should maintain the attorney-client relationship until properly relieved to "assure the uninterrupted representation of the accused."[231]

Since *Palenius* was decided, the Court of Military Appeals has continued to stress the importance of the right to counsel in the post-trial process. The Court of Military Appeals has gone so far as to state that, "[A]bsent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level."[232]

Furthermore, the Court of Military Appeals has made it obvious that the original trial defense counsel is the proper party to carry out any post-trial responsibilities.[233] Thus, as to the right to counsel in the post-trial process, a military accused enjoys a full extension

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[229] *Id.* at 93.

[230] *Id.* The Court of Military Appeals cited the provision for deferment of sentence in article 57*d*, U.C.M.J., as an example of what counsel might be expected to seek for an accused. Article 57*d*, U.C.M.J., provides in relevant part:

> On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement.

10 U.S.C. § 857(d) (1976).

[231] *Id.*

[232] United States v. Iverson, 5 M.J. 440, 442-43 (C.M.A. 1978).

[233] *See* United States v. Brown, 5 M.J. 454 (C.M.A. 1978) and United States v. Davis, 5 M.J. 451 (C.M.A. 1978). For an excellent discussion of the post-trial obligations of counsel, *see* Gravelle, *Some Goode News and Some Bad News*, The Army Lawyer, February 1979, at 1.

of the sixth amendment guarantee[234] in addition to the rights to appellate counsel secured by statute.[235]

E. RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

"Naturally, then, the right to the assistance of counsel means, inexorably, the *effective* assistance of counsel."[236] A military accused is entitled to counsel who exercises "the skill and knowledge which normally prevails [*sic*] within the range of competence demanded of attorneys in criminal cases."[237] Indeed, "a criminal accused is entitled to more than a competent counsel, his right is to one who *exercises* that competence without omission throughout the trial."[238]

In *United States v. Rivas*[239] the Court of Military Appeals applied these standards to counsel who had failed to object or move to strike the direct testimony of a witness who refused on self-incrimination grounds to answer certain questions upon cross-examination. Judge Perry found such to constitute ineffective assistance of counsel, and while Chief Judge Fletcher agreed that counsel had the primary obligation to make a proper motion, he opined that the trial judge should shoulder the responsibility also.[240] Judge Perry in *Rivas*

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[234] The Court of Military Appeals found that a denial of the right to effective assistance of counsel, secured in part by the sixth amendment, was inherent in the misadvice from and inaction of trial defense counsel, in United States v. Palenius, 2 M.J. 86 (C.M.A. 1977).

[235] Article 70c, U.C.M.J., provides for appellate counsel before the Courts of Military Review or Court of Military Appeals—"(1) when . . . requested to do so by the accused; (2) when the United States is represented by counsel; or (3) when the Judge Advocate General has sent a case to the Court of Military Appeals." 10 U.S.C. § 870c (1976).

[236] United States v. Rivas, 3 M.J. 282 (C.M.A. 1977).
[237] *Id.* at 288.
[239] 3 M.J. 282 (C.M.A. 1977).

[240] Chief Judge Fletcher "would have the onus upon the military judge when there is an apparent constitutional right in issue, such as a denial of cross-examination under the sixth amendment. . . ." Cooper, *United States v. Rivas and United States v. Davis: Effective Representation–Who Bears the Burden?*, The Army Lawyer, February 1978, at 1, 3. Chief Judge Fletcher's approach is to make the trial judge the guarantor of effective assistance of counsel. *Id.*

mainifested a willingness to evaluate effective assistance of counsel on the basis of trial decisions reflected in the record.[241]

In circumstances where the effectiveness of counsel is impaired by representation of more than one accused, the Court of Military Appeals has made it clear that "everyone concerned with the appointment and efficacy of counsel must be alert to the actuality, or potentiality, of a disabling conflict of interest whenever a single lawyer is considered for assignment to, or already represents multiple accused."[242] In other words, "it is not the *rule*, but rather the *exception*, that one attorney may represent multiple accused at a joint or common trial."[243] In *United States v. Davis*,[244] the Court of Military Appeals articulated the issue before it as "the standard to be employed by an appellate court in evaluating the effect of a conflict of interest upon the right to the effective assistance of counsel under the Sixth Amendment."[245] The assistant defense counsel in *Davis* prior to trial had represented the government's principal witness with respect to the latter's involvement in the case. The Court of Military Appeals found that such was an abandonment of his client by counsel, but predicated its reversal of the accused's conviction on the "failure of the trial judge to take the necessary steps to insure compliance with the Sixth Amendment rights in question."[246]

Thus, Court of Military Appeals decisions concerning multiple representation, as it impacts upon the right to effective assistance of counsel, are reflective of the fact that "[T]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."[247]

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[241] Judge Cook, dissenting in *Rivas*, found that the record could be construed to support counsel's actions at trial. He concluded that a hearing on the matter should be held because counsel's conduct was not the issue urged on appeal. Rather, the trial judge's inaction was the error argued. *See* United States v. Rivas, 3 M.J. 282, 291 (C.M.A. 1977) (Cooke, J., dissenting).

[242] United States v. Evans, 1 M.J. 206, 209 (C.M.A. 1975). Army Reg. No. 27-10, Legal Services: Military Justice, Appendix D-2a (1 Jan. 1979), enunciates the policy against multiple representation by Army counsel. *See* Thorne, *Representing Co-Accused–A New Perspective on Conflicts of Interest*, The Army Lawyer, January 1976, at 25.

[243] United States v. Blakey, 1 M.J. 247, 248 (C.M.A. 1976).
[244] 3 M.J. 430 (C.M.A. 1977).
[245] *Id.* at 430-31.
[246] *Id.* at 431.
[247] Holloway v. Arkansas, 435 U.S. 475, 490, (1978).

Indeed, these decisions presaged the Supreme's Court's holding in *Holloway v. Arkansas*[248] that failure of the trial judge to either have separate counsel appointed or take steps to assure that the risk of conflict was too remote to require such was a deprivation of the assistance of effective counsel under the sixth amendment. It would appear that the right to effective assistance of counsel is well secured in military criminal trials.[249]

F. RIGHT TO INDIVIDUAL COUNSEL

Article 38*b*, U.C.M.J.,[250] provides that the accused at a general or special court-martial has the right to be represented by civilian counsel he or she provides or by military counsel he or she selects if the latter is reasonably available. The right to individual counsel has been extended to representation at the taking of a deposition[251] as well as at a pretrial investigation.[252] Further, Article 38*b*, U.C.M.J.,[253] gives a military accused the right to obtain an individual military counsel from another armed service if reasonably available.[254]

The opportunity to obtain individual military counsel, however, is limited in some circumstances. That is, the right to individual military counsel "may not be insisted on in such a manner as to obstruct either other important operations of the service concerned or the orderly administration of military justice,"[255] as regards who is in

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[248] 435 U.S. 475 (1978).

[249] *See generally* Piotrowski & Taylor, *The Competency of Counsel*, The Army Lawyer, October 1977, at 14.

[250] 10 U.S.C. § 838*b* (1976). Paragraph 48, MCM, *supra* note 29, specified that only a lawyer may represent the accused before a courtmartial authorized to adjudge a punitive discharge, and that the accused may conduct his own defense without counsel.

The Supreme Court has held that the sixth amendment necessarily implies a right of self-representation as part of its guarantee of assistance of counsel. United States v. Faretta, 422 U.S. 806 (1975). There is no requirement, however, that the accused be advised of his right of self-representation at trial. United States v. Stoutmire, 5 M.J. 724 (A.C.M.R. 1978).

[251] United States v. Donati, 14 C.M.A. 325, 26 C.M.R. 104 (1958).

[252] United States v. Courtier, 20 C.M.A. 278, 43 C.M.R. 118 (1971).

[253] 10 U.S.C. § 838*b* (1976).

[254] United States v. Johnson, 22 C.M.A. 148, 48 C.M.R. 764 (1974).

[255] United States v. Vanderpool, 4 C.M.A. 561, 566, 16 C.M.R. 135, 140 (1974).

fact reasonably available.[256] For example, military judges are not deemed available to serve as counsel because of their adjudicative responsibilities.[257] While Article 70, U.C.M.J.,[258] providing for appellate counsel, is limited to the appellate level,[259] an accused is apparently not precluded from requesting individual military counsel from the ranks of appellate counsel.[260]

Not only does a military accused enjoy rights to individual counsel, but it is required that courts-martial records "should contain the accused's personal response to direct questions incorporating each of the elements of Article 38(b), as well as his understanding of his entitlement thereunder."[261] Furthermore, misadvice as to these rights will require reversal,[262] although a military accused need not necessarily be informed that individual military counsel if reasonably available will be provided free of charge.[263]

The Court of Military Appeals has considered that the provisions of Article 38*b*, U.C.M.J.,[264] create a broader right to counsel at

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[256] The Court of Military Appeals has held that Congress intended for article 38*b*, U.C.M.J., to be broad in application. Further, the right thereunder to individual military counsel if reasonably available "imports that the judgment as to availability will not depend solely on counsel's time card." United States v. Quimones, 1 M.J. 64, 69 (C.M.A. 1975).

[257] United States v. Spence, 4 M.J. 597 (N.C.M.R. 1977) and United States v. Rachels, 4 M.J. 697 (N.C.M.R. 1977)

[258] 10 U.S.C. § 870 (1976). This article provides, in pertinent part, that qualified defense counsel "shall represent the accused before the Court of Military Review or the Court of Military Appeals. . . ." *Id.*

[259] United States v. Patterson, 22 C.M.A. 157, 46 C.M.R. 157 (1973).

[260] United States v. Kelker, 4 M.J. 323 (C.M.A. 1978). The Court of Military Appeals avoided the question of whether article 70, U.C.M.J., appellate counsel are exempt *per se* from the ranks of those otherwise available for individual military counsel. *Id.* at 325. *See* United States v. Donaldson, 2 M.J. 605 (N.C.M.R. 1977); *see also* United States v. Brown, 2 M.J. 627 (A.F.C.M.R. 1976).

[261] United States v. Donohew, 18 C.M.A. 149, 152, 39 C.M.R. 149, 152 (1960).

[262] *See* United States v. Copes, 1 M.J. 182 (C.M.A. 1975) (military judge advised accused he could select any attorney in the staff judge advocate office but did not inform him of his right to choose any military attorney), and United States v. Jorge, 1 M.J. 184 (C.M.A. 1975) (accused with individual and appointed military counsel not informed of right to civilian counsel).

[263] *See* United States v. Perillo, 6 M.J. 678 (A.C.M.R. 1978), and United States v. Houston, 6 M.J. 613 (A.C.M.R. 1978).

[264] 10 U.S.C. § 838*b* (1976).

courts-martial "than that accorded to civilian defendants under the United States Constitution."[265] Not only does a military accused enjoy the right to appointment of counsel, but also has the right to reasonably available military counsel of his own choice.

Also, the right to individual counsel does not affect any rights to appointed counsel, the accused being entitled to retain appointed counsel as an associate counsel on the case.[266] Finally, the statutory rights to individual counsel not only are more sweeping than any sixth amendment requirement, but they must be spelled out to the accused on the record of trial.[267]

G. RIGHT TO COUNSEL AT CRITICAL STAGES OF PROSECUTION

The Supreme Court has recognized that a right to counsel extends to all critical stages in the prosecution "where important rights could be lost by an unknowing defendant absent the assistance of knowledgeable counsel."[268] Thus, an accused enjoys a right to counsel during custodial interrogation[269] and during lineups.[270]

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[265] United States v. Catt, 1 M.J. 41, 48 (C.M.A. 1975).

[266] United States v. Jordan, 22 C.M.A. 164, 166, 46 C.M.R. 164, 166 (1973). In this case the Court of Military Appeals held that an accused who already had individual civilian counsel had no right thereafter to individual military counsel because article 38*b*, U.C.M.J., provides for either individual civilian counsel *or* individual military counsel. However, an established attorney-client relationship with individual military counsel should not be severed absent good cause when an accused thereafter obtains individual civilian counsel. *See* United States v. Catt, 1 M.J. 41 (C.M.A. 1975).

[267] United States v. Donohew, note 261, *supra*.
[268] United States v. Jackson, 5 M.J. 223, 255 (C.M.A. 1978).
[269] Miranda v. Arizona, 384 U.S. 436 (1966), and United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967).

[270] United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1977). Wade holds that without counsel at a lineup, the accused would be denied a fair trial. Therefore, a witness at a counselless lineup could make an in-court identification only if it were clearly based upon observations independent of the lineup. *Gilbert* enunciates a *per se* exclusionary rule as to testimony about a counselless lineup.

Paragraph 153a, MCM, *supra* note 29, adopts the *Wade-Gilbert* rulings insofar as:

> [a]n identification of an accused or suspect as being a participant in the offense, whether made at his trial or otherwise, which was a *result* of his

As to the latter situation, a military accused has a greater right to counsel because the right attaches when attention has been focused on him or her as a suspect,[271] not just "at or after the initiation of" adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[272]

Of course, counsel may be waived[273] or even not required where there is no circumstance wherein the accused confronts the government in an adversary setting, as in photographic identification procedures.[274] While counsel is not required at all stations on the road to trial, a military accused may be entitled to "the right of consultation with counsel at earlier stages of a court-martial proceeding, in addition to situations involving custodial interrogation."[275]

> having been subjected by United States or other domestic authorities to a lineup for the purpose of identification without the presence of counsel for him is inadmissible against the accused or suspect if he did not voluntarily and intelligently waive his right to the presence of counsel . . . when an identification was made at a lineup conducted in violation of the right to counsel, that identification is a result of the illegal lineup, and a later identification by one present at such an illegal lineup is also a result thereof unless the contrary is shown by clear and convincing evidence.

See Dep't of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, at 27-44 (28 July 1970).

[271] *See, e.g.*, United States v. Longoria, 43 C.M.R. 676 (A.C.M.R. 1971).
[272] Kirby v. Illinois, 406 U.S. 628, 689 (1972).

In United States v. Quick, 3 M.J. 70, 71 (C.M.A. 1977), Judge Cook intimated in footnote 1 that a lineup after arrest but prior to any of the formal stages mentioned in *Kirby*, may not require counsel in spite of the Manual provision affording counsel to suspects. Because a military accused enjoys the more protective requirements of the Manual and pre-*Kirby* case law, it is doubtful if the Court of Military Appeals would adopt the less protective constitutional requirement.

After *Kirby* there was some confusion as to whether an individual would be entitled to counsel at a preindictment confrontation. The matter was resolved in Moore v. Illinois, 434 U.S. 220 (1977), wherein identification of a counselless suspect at a state preliminary hearing was held inadmissible under *Kirby's* language.

[273] *See, e.g.*, United States v. Schultz, 19 C.M.A. 311, 41 C.M.R. 311 (1970). This case involved a formation walk-by for identification. Accused was told if he did not want to participate without "legal counsel" he could fall out—held proper advice and waiver.

[274] United States v. Ash, 413 U.S. 300 (1973) (no right to counsel at a photographic display) and United States v. Smith, 44 C.M.R. 904 (A.C.M.R. 1971) (a military accused is not entitled to counsel at a photographic identification, even if in custody at the time of the identification).

[275] United States v. Adams, 21 C.M.A. 401, 45 C.M.R. 175, 180 (1972).

In *United States v. Jackson*,[276] the Court of Military Appeals addressed the issue of whether an accused was denied his statutory rights to counsel[277] where he had been denied counsel during a period of forty-two days' pretrial confinement. The accused urged that Article 27, U.C.M.J.,[278] "requires the appointment of counsel either upon preferral of charges or upon confinement."[279]

The Court of Military Appeals implicity rejected the accused's assertion, and also found no violation of the Constitutional right to counsel because "[a]t no 'critical' proceeding associated with this special court-martial did the appellant confront the Government alone and unadvised."[280] Nonetheless, the Court of Military Appeals felt, "quite apart from the Constitution, we are constrained to examine the fundamental fairness of this purported obstruction of appellants' additional right to the representation of counsel."[281] The Court in *Jackson* asserted its general supervisory authority as a basis for expecting "assignment of counsel for representation at the earliest possible moment in the process of military justice."[282]

In earlier cases involving disposition on a speedy trial basis, the Court of Military Appeals had recognized a need for assistance for

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[276] 5 M.J. 223 (C.M.A. 1978).

[277] Article 27, U.C.M.J., provides for the appointment of counsel in special and general courts-martial. 10 U.S.C. § 827 (1976). Article 32*b*, U.C.M.J., provides for counsel at the investigation prior to a general court-martial. 10 U.S.C. § 832*b* (1976). In addition, para. 140 of the MCM, *supra* note 29, gives a military suspect in custody an opportunity to consult counsel. Paragraph 140a(2), MCM, *supra* note 29.

Service regulations may require counsel during pretrial confinement. For example, Dep't of Army, Regulation No. 27-10, Legal Services: Military Justice, para. 2-35 (1 Jan. 1979) [hereinafter cited as AR 27-10], states, "the Staff Judge Advocate concerned will insure that a legally qualified defense counsel is appointed for and consults with the accused within 72 hours from the time he enters pretrial confinement."

[278] 10 U.S.C. § 827 (1976).
[279] United States v. Jackson, 5 M.J. 223, 224 (C.M.A. 1978).

[280] *Id.* at 225. In Gerstein v. Pugh, 420 U.S. 103 (1973), the Supreme Court held that a judicial determination of probable cause was necessary to support pretrial detention. The Court did not require counsel. In Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976), the Court of Military Appeals adopted the Gerstein requirement.

[281] United States v. Jackson, 5 M.J. 223, 225 (C.M.A. 1978).
[282] *Id.* at 227.

counsel for one in confinement.[283] That is, where accused was in confinement without charges having been preferred, and was denied access to counsel, such could be considered "so fundamentally unfair that the resultant impact is unconscionable, and fundamental fairness requires dismissal."[284]

In any case, the Court of Military Appeals had clearly indicated prior to *Jackson* that "[T]he need for the assistance of counsel during extended, but necessary confinement, is patent."[285] In *Jackson*, however, the court found no prejudice because counsel at trial indicated that he was prepared and this "effectively waived any objections to the fundamental fairness of the representation of counsel provided here."[286]

In *United States v. Booker*[287] the Court of Military Appeals extended the right to counsel to another critical point in the military justice system. Namely, a military accused's decision to accept disciplinary action under Article 15, U.C.M.J.,[288] or summary court-martial under Article 20, U.C.M.J.,[289] should be preceded by advice to the effect that he or she may first confer with an independent counsel.[290] The absence of a showing that such occurred, together with other *Booker* requirements,[291] results in an exclusionary rule

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[283] *See* United States v. Mason, 21 C.M.A. 389, 45 C.M.R. 163 (1972) (unjustified delays of 131 days between confinement and trial were a denial of accused's right to a speedy trial), and United States v. Przybycien, 19 C.M.A. 120, 41 C.M.R. 120 (1969) (117 days delay between apprehension and trial not a denial of speedy trial).

[284] United States v. Mason, 21 C.M.A. 389, 399, 45 C.M.R. 163, 173 (1972).

[285] United States v. Przybycien, 19 C.M.A. 120, 122, 41 C.M.R. 120, 122 note 2 (1969).

[286] United States v. Jackson, 5 M.J. 223, 227 (C.M.A. 1978).

[287] 5 M.J. 238 (C.M.A.), *partially reconsidered*, 5 M.J. 246 (C.M.A.); *originally published at* 3 M.J. 443 (C.M.A.), *as modified at* 4 M.J. 95 (C.M.A. 1977).

[288] Article 15, U.C.M.J., provides for disciplinary punishment of a nonjudicial nature. 10 U.S.C. § 815 (1976).

[289] Article 20, U.C.M.J., provides for limited court-martial punishment if an accused does not object to such. 10 U.S.C. § 820 (1976). As discussed in note 203, *supra*, the Supreme Court has determined that a trial by summary court-martial is not a "criminal proceeding." Middendorf v. Henry, 425 U.S. 25 (1976).

[290] United States v. Booker, note 287, *supra* at 243.

[291] For an excellent discussion of the meaning of *Booker*, *see* Cooke, *Recent Development in the Wake of United States v. Booker*, The Army Lawyer, November 1978, at 4.

as to evidence of nonjudicial or summary court-martial proceedings in subsequent trials.[292]

The *Booker* and *Jackson* decisions reflect a determination by the Court of Military Appeals to require counsel in situations where it would be fundamentally unfair to do otherwise. Thus, even in the absence of specific constitutional or statutory mandates the Court of Military Appeals has acted to assure a right to counsel at critical stages of prosecution.

H. SUMMARY

The sixth amendment right to counsel applies to criminal prosecutions by court-martial generally,[293] although specifically "[t]he question of whether an accused in a court-martial has a constitutional right to counsel has been much debated (footnote omitted) and never squarely resolved."[294] Indeed, the Supreme Court has seemingly left to Congress and the military appellate courts, the issue of the extent to which a military accused enjoys a right to counsel at courts-martial.[295] The Court of Military Appeals has not only rigorously enforced statutory and constitutional guarantees to

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[292] *Id.* at note 20, 10–11.

[293] "From the earliest terms of this Court we have sustained the right to assistance of counsel prior to and during trial on criminal charges." United States v. Annis, 5 M.J. 351, 353 (C.M.A. 1978).

[294] Middendorf v. Henry, 425 U.S. 25, 33 (1976).

[295] The Supreme Court sidestepped imposing a sixth amendment requirement for counsel at summary courts-martial by declaring such not be "criminal prosecutions" within the constitutional guarantee. Middendorf v. Henry, note 294, *supra*.

There is some irony in this holding because the Court of Military Appeals, in an earlier multifaceted decision, had indicated that courts-martial were "bound by the same limits of the right to counsel as bind civilian courts." United States v. Alderman, 22 C.M.A. 298, 300, 46 C.M.R. 298, 300 (1973). And, of course, the exclusion of summary courts-martial from the sweep of the sixth amendment because such are not "criminal prosecutions" is a somewhat labored escape from the constitutional requirement for counsel at a "criminal prosecution" whenever the consequence of conviction is imprisonment. Argersinger v. Hamlin, 407 U.S. 25 (1972).

In Scott v. Illinois, —— U.S. ——, 47 U.S.L.W. 4250 (5 Mar. 1979), the Supreme Court specifically held that the constitutional right to counsel turns upon actual imprisonment. The Court refused to extend the availability of the right to

counsel, but has further broadened counsel protections under its exercise of supervisory responsibility over the military justice system.

VIII. CONCLUSION

How well have military courts met the responsibility of securing a fair trial for military accused by applying the fundamental protections of the sixth amendment? Exceedingly well. With perhaps only the exception of the right to a jury trial,[296] a military accused appears to enjoy full benefit of sixth amendment provisions.

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misdemeanor prosecutions in which a state statute authorizes imprisonment but only a fine is adjudged.

In *Middendorf*, the Supreme Court limited its holding to summary courts-martial and did not address the sixth amendment's guarantee of counsel with respect to special and general courts-martial. Justice Powell, concurring, seems to suggest that the present statutory scheme is sufficient to satisfy the sixth amendment. Middendorf v. Henry, 425 U.S. 25, 50 (1976).

Article 27, U.C.M.J., does, of course, provide for qualified counsel at special and general courts-martial. Special courts-martial are excepted when such counsel "cannot be obtained on account of physical conditions or military exigencies." 10 U.S.C. § 827c(1) (1976). As to this exception, Army regulations, for example, provide that no special courtmartial within the continental United States "will assemble without a qualified defense counsel if the accused has requested such counsel." AR 27-10, para. 2-14d.

The very limited circumstances under which qualified counsel would not be provided at courts-martial would not necessarily undermine the statutory scheme to the extent that it would be constitutionally defective. Even Justice Marshall, dissenting from the majority's holding in *Middendorf* that the sixth amendment is inapplicable to summary courts-martial, believes only "that the Sixth Amendment demands that court-martial defendants *ordinarily* be accorded counsel" (emphasis added). Middendorf v. Henry, 425 U.S. 25, 54 (1976). Indeed, given the constitutional responsibility of Congress to "make Rules for the Government and Regulation of the land and naval forces" under article I, section 8, both the Supreme Court and the Court of Military Appeals are likely not to find the present statutory scheme providing counsel for military accused unconstitutional under the sixth amendment. *Cf.* United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411 (1963).

Federal decisions have found no constitutional defect in statutory schemes which permitted less than legally qualified counsel at courts-martial. Curci v. United States, 577 F.2d 815 (2d Cir. 1978). "[T]he representation by nonlegally trained officers provided by article 27(c) is adequate and effective to secure to an accused the full equivalent of the Sixth Amendment right to counsel. . . . " Kennedy v. Commandant, 377 F.2d 339, 344 (10th Cir. 1967).

[296] "Members of the armed forces have only a token representative jury system because Congress and the courts have accepted the arguments that military courts

Indeed, the fundamental guarantees to a fair trial found in the sixth amendment have been not only reflected in statutory requirements and judicial decisions, but have been extended beyond those essential clauses to provide military accused more than constitutional protections. Suffice it to conclude that a military accused stands well within the protective shade of the sixth amendment, and is well guarded by statutory and other provisions.

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are exempt from the constitutional requirements of trial by jury. . . . " Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 Indiana L.J. 193, 194 (1973); *see also* Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 Mil. L. Rev. 71 (1972).

A pilot program for the random selection of court-martial members was tried at Fort Riley, Kansas, in 1973-1974. *See* United States v. Yagu, 2 M.J. 484 (A.C.M.R. 1975), and United States v. Perl, 2 M.J. 1269 (A.C.M.R. 1976).

CULVER V. SECRETARY OF THE AIR FORCE: DEMONSTRATIONS, THE MILITARY, AND THE FIRST AMENDMENT*

by Gerald P. McAlinn**

The Culver case dates from the Vietnam era. Captain Culver, an Air Force judge advocate, participated in an anti-war demonstration in London. Subsequently, a court-martial found him guilty of violating an Air Force regulation prohibiting such activities. This finding was eventually upheld by the Court of Appeals for the District of Columbia circuit.

Mr. McAlinn analyzes the decision, its antecedents, and its implications for the future. He discusses the regulation which was the subject of the case. The courts, he believes, could easily have reached a different result in applying the standard of clear danger to loyalty, discipline, or morale. Mr. McAlinn concludes, moreover, that the case represents a departure from precedent in the first amendment area.

I. INTRODUCTION

Despite the literal language of the first amendment,[1] the United States Supreme Court has never[2] interpreted the freedom of speech

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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[1] The first amendment expressly states that, "Congress shall make no law . . . abridging the freedom of speech . . . . " U.S. Const. amend. I.

[2] Comment, *United States v. Kelner: Threats and the First Amendment*, 125 U. Pa. L. Rev. 919 (1977).

Justice Brennan, writing for the Court in *Roth*, reviewed the amendment's history and concluded, "it is apparent that the unconditional phrasing of the First

provision as an absolute.[3] This has led the Court, by necessity, into the difficult task of defining the extent of the first amendment's reach and the degree of protection to be accorded the speech in question. Perhaps in no single area is the analysis more complex and the decision more significant than in the context of the military.[4]

Much of the difficulty stems from the peculiar nature of the military. Considerations such as troop morale and discipline, national security, political neutrality, and its "primary business . . . to fight or be ready to fight wars should the occasion arise"[5] set the military apart from civilian society.[6] In *Culver v. Secretary of the Air Force*,[7] the United States Court of Appeals for the District of Co-

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Amendment was not intended to protect every utterance." Roth v. United States, 354 U.S. 476, 483 (1957), *overruled on other grounds*. *See* Cohen v. California, 403 U.S. 15, 19 (1971); Frohwerk v. United States, 249 U.S. 204, 206 (1919).

For support of the absolutist position, *see* Cahn, *Mr. Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962).

[3]The use of the term *absolute* is slightly misleading. In fact, no absolutist advocates that all communications are protected from infringement all the time. Rather, the absolutist looks at the speech in question and decides whether it is protected or unprotected. Having decided that the speech falls outside the ambit of the first amendment, he or she considers that it merits no constitutional attention. Street v. New York, 394 U.S. 576 (1969) (Black, J., dissenting); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

On the other hand, a nonabsolutist or balancer weighs the social interest in free speech against the social value to be achieved by the abridgement. For a balancer, the essential inquiry is not whether the speech is protected or unprotected, but rather whether the infringement is justified by the social interests to be served. Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959). *See* Emerson, Toward a General Theory of the First Amendment 53–58 (1966), for a complete discussion of the two positions. *Compare* Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424, 1440–48 (1962), criticizing the use of the balancing approach, *with* McKay, *The Preference for Freedom*, 34 N.Y.U.L. Rev. 1182, 1193–1203 (1959), criticizing the absolutist position.

[4]Analogous considerations have been examined by the courts in the areas of prisons and schools. Procunier v. Martinez, 416 U.S. 396 (1974); Tinker v. Des Moines School District, 393 U.S. 503 (1969). However, in both *Procunier*, involving a prison, and *Tinker*, a school, the Court did not have to consider in the balance the interests of national security or of foreign relations.

[5]United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1950).

[6]*See* Parker v. Levy, 417 U.S. 733, 743 (1974), where the Court stated that "the military is, by necessity, a specialized society separate from civilian society."

[7]559 F.2d 622 (D.C. Cir. 1977).

lumbia Circuit was confronted with the task of reconciling first amendment protections and aspirations with the realities of military life. In holding that an Air Force regulation prohibiting all demonstrations on foreign soil by American servicemembers did not violate the first amendment, the *Culver* court exalted military necessity to the exclusion of a careful analysis of competing values. The deferential test fashioned by the court required no individualized showing of necessity by the military, thus going beyond Supreme Court precedents in the first amendment military area.[8]

The appellant, Captain Culver, an attorney[9] assigned to the Judge Advocate General's Corps of the United States Air Force and stationed at the Royal Air Force (RAF) Base in Lakenheath, Suffolk, England, was tried before a general court-martial in July of 1971. He was charged and convicted of conduct unbecoming an officer and a gentleman under Article 133[10] of the Uniform Code of Military Justice (UCMJ) and of violating a lawful regulation under Article 92, UCMJ.[11] The Article 133 charges stemmed from a series of incidents beginning on May 24, 1971, when it was alleged that Captain Culver solicited military personnel to attend a demonstration[12] expressly prohibited by Air Force Regulation (AFR) 35-15, para. 3e (3)(b).[13] Further, Culver was said to have violated Article

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[8] Greer v. Spock, 424 U.S. 828 (1976); Parker v. Levy, 417 U.S. 733 (1974).

[9] Culver v. Secretary of the Air Force, 389 F. Supp. 331, 333 (D.D.C. 1975). Reportedly, Culver settled in England after leaving the Air Force, and, as of 1977, had become a barrister. 5 Mil. L. Rep. 1009 (1977).

[10] 559 F.2d at 623. 10 U.S.C. § 933 (1976). This statute provides in relevant part, "Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[11] 559 F.2d 623. At 10 U.S.C. § 892 (1976) it is provided, "Any person subject to this chapter who—(1) violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct."

[12] 559 F.2d at 624-26. The appellant was observed in civilian clothes handing out leaflets on a road outside the RAF base. The leaflet called for each recipient to sign a petition calling for an end to the Vietnam war, and asked each recipient to join Culver and others when the petitions were taken to the United States Embassy for transmittal to Washington. *Id.* at 625.

[13] The regulation provides in part, "Members of the Air Force are prohibited from participating in demonstrations when: . . . (b) in a foreign country."

92 by his own attendance at a demonstration in London on May 31, 1971 in contravention of AFR 35-15.[14]

Upon exhausting all avenues of military review,[15] Captain Culver filed suit in the United States District Court for the District of Columbia,[16] seeking collateral review[17] of his conviction which had resulted in a sentence of a $1,000 fine and a reprimand.[18] After the district court granted the motion of the appellee, the Secretary of

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[14] *Id.* at 623. The court recounts in considerable detail the events of May 31, 1971.

Prosecution testimony revealed that five chartered buses arrived at Speaker's Corner at Hyde Park, London, discharging military personnel in civilian clothes. A total of approximately 200 civilian and military personnel were present with the military members. They were issued white arm bands depicting a helmet and upraised, clenched fist.

After six unidentified men read statements to the media, the group received their petitions and proceeded to the embassy in small groups, approximately 10 to 25 yards apart. Each group entered and presented their petitions at the embassy, walked back to Hyde Park, and were taken by their buses to a rock concert. Captain Culver was identified and photographed at both the park and the embassy wearing an armband. *Id.* at 626–27.

[15] The appellant's military appeal was never heard by the Court of Military Review. His $1,000 fine and reprimand did not reach the level of severity necessary to entitle him to automatic review. This, and The Judge Advocate General's refusal to grant a discretionary appeal, led Judge Leventhal to conclude that: "Since appellant's constitutional claims were thus not reviewed by any appellate court, either military or civilian, I feel free to approach them almost as though I were a member of the Court of Military Appeals undertaking direct review." *Id.* at 631 (Leventhal, J., concurring).

Culver's court-martial took place in 1971. It is interesting to speculate that the case might have followed a different path if the Court of Military Appeals had issued its *McPhail* decision before then. McPhail v. United States, 1 M.J. 457 (1976).

[16] Culver v. Secretary of the Air Force, 389 F. Supp. 331 (D.D.C. 1975).

[17] The United States Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. In this regard, article 76, U.C.M.J., 10 U.S.C. § 876 (1976), makes military review of court-martial proceedings "final and conclusive" and "binding upon all . . . courts . . . of the United States."

Notwithstanding article 76, the Supreme Court has not foreclosed collateral review of constitutional issues. Burns v. Wilson, 346 U.S. 137, 142 (1953), *citing* Gusik v. Schilder, 340 U.S. 128 (1950); Kauffman v. Secretary of the Air Force, 415 F.2d 991, 994 (D.C. Cir. 1969). *See generally* Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 Hastings L. J. 325, 326 (1971).

[18] 559 F.2d 623.

the Air Force, for summary judgment,[19] Culver took an appeal to the District of Columbia Circuit Court of Appeals to challenge the dismissal of his suit.

II. THE CULVER COURT'S RATIONALE

Renewing his previously unsuccessful attack on the regulation,[20] Captain Culver initially argued that the regulation, specifically the word "demonstration" therein, was unconstitutionally vague, overbroad and capable of reaching many clearly protected activities. Since one of the functions of the regulation is to preserve harmonious relations with the host nation,[21] Culver contended that the scope of AFR 35-15 should be narrowed to include only those demonstrations adversely affecting the relationship. Finally, Culver asserted that his behavior was not, in fact, part of a demonstration.[22]

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[19] The district court, in a Memorandum and Order by Judge Pratt, relied on the definition of a demonstration given in United States v. Bradley, 418 F.2d 688, 690 (4th Cir. 1969), that:

> If there is any feature common to all the listed acts, it is that the expression they embody is not merely offered to the public, but overtly displayed and proclaimed. They are "demonstrative" activities. Such acts as picketing, sit-ins, protest marches, speeches and acts ordinarily associated with demonstrations, like parading, singing and display of placards, all, as appellants aptly put it, "inevitably intrude upon the senses of those within earshot or eyesight." The casual passerby cannot ignore the event—he must notice it and cannot escape exposure to its message.

398 F. Supp. at 333.

Finding that Captain Culver had been involved in a demonstration, Judge Pratt concluded that the regulation was not unconstitutional, and that as applied "to plaintiff [it] was both reasonable, necessary and appropriate to the maintenance of morale and discipline." *Id.* at 334.

[20] 559 F.2d 623-24.

[21] Prior to the *Culver* case, the United States and Great Britain had become parties to a multilateral treaty, the NATO Status of Forces Agreement. Among other things, this treaty governs the presence of American troops on British soil. The Air Force argued that this treaty made necessary AFR 35-15. 559 F.2d 628. *See* note 33, *infra*, for the text of the relevant treaty provision.

[22] 559 F.2d 623 note 5. In response, the Air Force asserted that Culver was without standing to challenge the regulation on vagueness and overbreadth grounds, as it is neither vague nor overbroad as applied to him. Further, they argued that the court-martial's finding is binding as to the existence of an appropriately defined demonstration and that, when taken in context, AFR 35-15 is a valid enactment supported by legitimate military interests. *Id.* at 624 note 6.

The *Culver* court, in an opinion written by Senior District Judge Christensen, in which Judge Leventhal joined and concurred and Judge Bazelon dissented, agreed that the threshold consideration was the constitutionality of AFR 35-15. In meeting Culver's contentions,[23] the court declined to consider the numerous authorities dealing with the vagueness and overbreadth doctrines. Apparently fearing the court's inability to resist the "temptation in such a crowded legal art to become captives of collateral problems of the past and the apprehensions of the future,"[24] Judge Christensen elected, instead, to rely exclusively on the principles enunciated in *Greer v. Spock*[25] and *Parker v. Levy*.[26] These cases were deemed by the court to be so persuasive and precedential as to make its "principle task an understanding and statement of the controlling facts in light of them."[27] Despite this emphatic language, however, the

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[23] The court also noted that the time frame within which this case arose was "somewhere between the travail of Vietnam and prior wars and, hopefully, the more complete release of freedom from the remaining constraints of military necessity abroad, as well as at home." *Id.* at 624. Unfortunately, Judge Christensen merely hints at but does not reveal the significance to be placed on the time of the occurrence. *Id.* at 624.

It is not difficult to imagine the serious and immediate considerations that arise during times of conflict. *See* Korematsu v. United States, 323 U.S. 214 (1944). Not surprisingly, many of the first amendment cases in the military involve controversies during the Vietnam war. *See* Parker v. Levy, 417 U.S. 733 (1974), in which the Supreme Court reviewed and upheld an Army doctor's conviction for refusal to train Special Forces soldiers and for his urging of black soldiers not to go to Vietnam. *See also* Avrech v. Secretary of the Navy, 520 F.2d 100 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 970 (1976) concerning a conviction for attempting to publish a disloyal statement urging United States withdrawal from Vietnam, *and* Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975), in which Air Force servicemen were convicted for circulating an anti-war petition within Vietnam.

[24] 559 F.2d at 624.

[25] 424 U.S. 826 (1976). In *Greer*, the Supreme Court upheld an Army regulation banning the distribution of political campaign literature within the confines of Fort Dix, New Jersey.

[26] 417 U.S. 733 (1974). *Parker* involved the Supreme Court's rejection of a constitutional challenge, on the grounds of vagueness and overbreadth, against articles 90, 133, and 134 of the U.C.M.J.

Article 90, 10 U.S.C. § 890 (1976), proscribes assault or willful disobedience of a superior commissioned officer; article 133, 10 U.S.C. § 933 (1976), deals with conduct unbecoming an officer and a gentleman; and article 134, 10 U.S.C. § 934 (1976), is the so-called "general article," punishing all disorders and neglects [not specifically mentioned in the U.S.M.J.] to the prejudice of good order and discipline in the armed forces.

[27] 559 F.2d at 624.

majority never specified which of the principles announced in *Greer* and *Parker* were relevant in the *Culver* situation.

Rejecting Culver's interpretation of the events,[28] the court concluded that an examination of the facts revealed that a "demonstration pure and simple" had occurred.[29] In so holding, it applied an objective standard of knowledge, indicating that it was clear that "ordinary persons" and particularly an officer in military service would know that the events as planned and carried out constituted a

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[28]The leaflet distributed by Captain Culver expressly denied that the presentation of petitions at the embassy would constitute a demonstration. It urged all to attend, but reminded the servicemembers that "there will be no placards, no buttons, no marches or assaults, just a group of G.I.'s presenting a petition . . . . " *Id.* at 625 note 7.

The document also contained the following comments:

> The presentation. Some people have asked me if the presentation on the 31st will be legal. The answer is that it will be. It is clear that under AFR 35–15 it is an offense to attend a demonstration in a country other than the U.S. But this will not be a demonstration . . . . So long as you are clean and don't make any trouble there is nothing wrong with coming to the presentation . . . . It is legal. All we are doing is exercising a right that we have as Americans, to present our petition to the government and to have a party.

Id. at 625.

Support for the position that a servicemember has a statutory right to petition can be found in 10 U.S.C. § 1034 (1976), which states: "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

Also, AFR 30–1(9) states, "Members of the Air Force . . . have the right in common with all other citizens, to petition the President, the Congress or other public officials . . . . " This regulation acknowledges the right of Air Force members to petition on foreign soil, provided that they first receive authorization from the base commander. The record does not reveal whether Captain Culver sought permission to petition.

Judge Leventhal specifically addressed Culver's claim that only a presentation of petitions was intended, and that the group met first in Hyde Park to conform to an order issued by Scotland Yard. He found that Culver's activity was not a mere presentation of petitions, concluding that: "[T]he event was from the start projected as 'a large assembly' and . . . it was the size of the assembly which, in the interest of public order, required the modification of plans. A petition could have been presented without the eye-catching assembly." *Id.* at 632 (Leventhal, J., concurring).

Judge Christensen, like Judge Leventhal, did not find any distinction between a presentation and a demonstration under these facts. *Id.* at 627.

[29]*Id.*

proscribed demonstration.[30] Therefore, at least as applied to Captain Culver, the regulation was not so vague as to deprive him of fair notice of the forbidden activity.[31]

The court next turned to the Air Force's contention that AFR 35–15 was supported by legitimate governmental interests.[32] The government had conceded that, while AFR 35–15 was not promul-

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[30] *Id.*

[31] The court emphasized that, on May 25, 1971, Culver had received a written memorandum from his staff judge advocate interpreting AFR 35–15. This interpretation was phrased in terms that left little doubt that it was issued to inform the Captain that the planned activities were considered illegal by the base commander and his legal advisor. The text of the interpretive document read as follows:

> Unofficial publications have recently offered opinions as to the legality of certain protests and dissent activities. Those opinions are incorrect. If accepted and acted upon they subject participants to severe punitive action. All personnel are advised that paragraph 3E3 of AFR 35–15, dissent and protest activities, specifically prohibits patricipation [sic] by military personnel in any demonstration in a foreign country. The prohibition applies whether the serviceman or servicewoman is on or off base, in or out of uniform, on or off duty. It also applies in full force irrespective of which term or name is given to the demonstration.

Id. at 626.

Judge Bazelon denied the significance of this interpretative document on two grounds. First, Culver received it after the incidents of solicitation of May 24. Second, the record of the court-martial proceedings did not reveal whether the "statement carried the force of law." Such force would have arisen from issuance of the statement by the proper source of authority, the commander, so as to apply to Captain Culver's activities on May 31. *Id.* at 635 note 3 (Bazelon, J., dissenting).

[32] The court articulated the military's interest as one of maintaining political neutrality. *Id.* at 628. The need for military neutrality is frequently cited to justify regulations designed to insure civilian control over the military. Greer v. Spock, 424 U.S. 828, 839 (1976); Parker v. Levy, 417 U.S. 733, 771 (1974) (Douglas, J., dissenting); United States v. Howe, 17 C.M.A. 165, 175, 37 C.M.R. 429, 439 (1967). *See generally* Sherman, *supra* note 17; Note, *Freedom of Speech in the Military*, 8 Suffolk L. Rev. 761 (1974).

In a foreign setting, the "man on the white horse" theory, as it is often called, becomes somewhat distorted. As United States servicemembers abroad present little or no risk of endangering the civilian government in the United States, the desire for neutrality must logically be phrased in terms of political neutrality in relation to the host country's affairs. Thus, Culver's argument that protesting the Vietnam war, off base and in civilian clothing, by taking petitions to the United States Embassy, is not the type of behavior which the status of forces treaty intended to reach, takes on added credence.

Two commentators have taken the position that, when American soldiers abroad are involved in political activity distinctly related to American issues, then

gated specifically to carry out United States treaty obligations with Great Britain,[33] the regulation was nevertheless an effective means of enforcing the treaty.[34] Accepting this goal as a valid function of AFR 35-15, the court interpreted the language of the treaty, "It is the duty of a force . . . and its members . . . to abstain . . . from any political activity in the receiving state,"[35] as excluding all political activity, thereby justifying the Air Force's complete ban on political demonstrations.[36]

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prophylactic bans should not apply. Zillman and Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on a Society Apart*, 51 Notre Dame Law. 397, 409-10 (1976).

Indeed, the Court of Military Appeals, in United States v. Alexander, 22 C.M.A. 485, 487, 47 C.M.R. 786, 788 (1973), found that the purpose of an Army regulation banning all demonstrations on foreign soil was to "avoid implying Army sanction of the cause." In so doing, the court reversed in part the conviction of a black soldier who had particpated in a demonstration against the Army's racial policies while stationed in Germany. The *Alexander* court reasoned that the scope of the regulation did not reach protests involving internal Army affairs.

Likewise, in the present case, assuming arguendo that a demonstration occurred and that members of Culver's group were recognizable as American servicemembers, it is highly unlikely that a British observer of the May 31 activities would conclude that Captain Culver had the Air Force's sanction.

[33] North Atlantic Treaty, Status of Forces, 4 U.S.T. 1792, T.I.A.S. No. 2846 (1951), provides at article II:

> It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving state and to abstain from any activities inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving state. It is also the duty of the sending state to take neccessary measures to that end.

[34] 559 F.2d at 640 note 19 (Bazelon, J., dissenting).
[35] 4 U.S.T. 1792, T.I.A.S. No. 2846 (1951), art. II.

[36] The question of the proper interpretation of the phrase, "any political activity," is one of first impression. 599 F.2d at 641 (Bazelon, J., dissenting). The legislative history is barren of discussion on this point. However, testimony before the joint hearing of the Senate reveals that the North Atlantic Treaty gave rise to some concern over the degree of constitutional protection afforded servicemembers abroad. The controversy, however, seemed to center more on the procedural safeguards of American soldiers on trial in foreign courts than on the first amendment. *Bills to Improve the Administration of Justice in the Armed Services: Joint Hearings on S. 745-762, S. 2906 and 2907 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary and a Special Subcomm. of the Comm. on Armed Services*, 89th Cong., 2d Sess., Part 2, app. A at 851 (statement of Edward D. Re).

In light of the reasoning in United States v. Alexander, 22 C.M.A. 485, 47 C.M.R. 786 (1973), Judge Bazelon's interpretation of the treaty seems the most plausible.

Thus, relying on the common usage of the word *demonstration*, including the gloss placed on it derived from the regulation's context, the treaty obligation and the nature of the military's mission in foreign lands, Judge Christensen dispensed with Captain Culver's overbreadth argument in one paragraph. The court found that in no conceivable situation could the regulation be used to reach fully protected activity.[37]

Having dealt with the defendant's claims of vagueness and overbreadth, the court never expressly confronted the basic issue which the case presents, that is, whether the interests posited by the Air Force are so important as to justify a complete ban on all political demonstrations by servicemembers on foreign soil. By emphasizing the definitional dispute regarding the word *demonstration*, the court managed to escape the difficult task of articulating an appropriate test which would successfully balance the interests of the military and the first amendment rights of its members. Instead, the court adopted a position of almost complete deference to the government's allegation of military necessity, never requiring that the Air Force present proof of specific harm in the instant situation. In its failure to conduct an individualized inquiry for harm, thereby tipping the scales in the military's favor, the *Culver* court has exceeded all precedent in the first amendment military area.[38]

He notes that, "[g]iven the power of local government to control public protests and given the power of U.S. military authorities to punish their troops for violations of local law . . . [there is] . . . no justification for the broad, absolute prohibition of AFR 35-15 . . . ." 559 F.2d 639 (Bazelon, J., dissenting). Therefore, he concludes in effect that AFR 35-15's complete ban is not the least restrictive alternative in meeting the government's interest in maintaining amicable foreign relations. A strict interpretation of the treaty could result in preventing armed forces members from voting and discussing politics while stationed abroad. *Id.* at 641.

Judge Leventhal rejects this view of the consequences by finding that elections and on-base discussions are not on foreign soil. *Id.* at 632 note 2 (Leventhal, J., concurring). At any rate, a nonliteral interpretation, *i.e.*, one which permits the government to issue regulations banning only political activity that interferes with the host country's local politics or threatens to offend local governments, would avert the constitutional problems presented by AFR 35-15.

[37] *Id.* at 630.

[38] In his concurrence, Judge Leventhal rearticulated the basic principles of the majority opinion rather than stressing any fundamental disagreement with Judge Christensen. The only major point of departure is in Judge Leventhal's interpretation of the relationship between AFR 35-15 and the treaty. He distinguished be-

Writing in dissent, Judge Bazelon found the word *demonstration* to be vague, in that, as he perceived it, Captain Culver's behavior fell somewhere between a traditional demonstration[39] and a lawful individual petitioning,[40] thus affording no clear notice to the defendant that his conduct was unlawful.[41] In addition, Judge Bazelon differed from the majority in his interpretation of the Status of Forces Treaty. He argued that the purpose of the treaty was to prohibit interference by the military in local politics of the host nation, and that therefore the regulation's complete ban on all political demonstrations was too restrictive. Lastly, Judge Bazelon emphasized that the government has an obligation to justify the necessity of the ban and that no proof of harm was given in this case. Unlike the majority, Judge Bazelon did not shirk the task of balancing the interests, but formulated a test relevant to the concerns of the military and the mandate of the first amendment. Judge Bazelon's standard would require a showing by the military that "a significant effect on our relations would probably occur or had already occurred because of a particular demonstration."[42]

III. MILITARY NECESSITY AND THE FIRST AMENDMENT

The most critical distinction between the court's opinion and Judge Bazelon's dissent lies in the extent of the protection accorded under the first amendment. Both employed a balancing technique; however, the majority balanced silently and merely deferred to the government's proclaimed military necessity. Although it recognized

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tween political activity taking place on the base, which he determined not to be on foreign soil, and that which occurs off base.

According to Judge Leventhal, when the activity is off base, the treaty contemplates a ban sufficiently broad that it removes from the individual servicemember the complicated determination of the impact of his actions on foreign relations. Believing that Culver had been involved in a demonstration, he concluded that the breadth of AFR 35-15 was constitutionally justified by military necessity in foreign affairs. *Id.* at 632.

[39] *See* note 19 *supra*, for the definition of demonstration applied by the district court.
[40] *See* note 28 *supra*, for a discussion of the right to petition as applied to armed forces members.
[41] 559 F.2d at 634.
[42] *Id* at 639.

that the first amendment has application to the military, the *Culver* court was swayed by the fundamental differences between military and civilian society.

Courts and commentators have long acknowledged that the unique status of the military has important implications for the first amendment.[43] As distinguished a commentator as Professor Emerson has stated that the "military system is outside the civilian system of freedom of expression and subject to different rules."[44] The value of free speech inherent in a democracy is not as strongly evident when transposed into an essentially authoritarian structure such as the military. Professor Emerson does not conclude that the soldier has no first amendment rights, but only that these rights must be adjusted to fit the military structure.[45]

The military, it must be remembered, is a system that relies on loyalty and obedience to orders. Without the capacity to respond instantaneously and unquestioningly in times of crisis, much if not all the Army's effectiveness is lost. The Supreme Court, in *Parker v. Levy*,[46] has recently endorsed the view that military life and its demands necessitate a modification of constitutional rights to preserve this needed order and efficiency.[47]

Although order and efficiency are strong military interests, military and civilian courts cannot abdicate their obligation to see that any compromise of first amendment values is in fact justified by

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[43] Avrech v. Secretary of the Navy, 520 F.2d 100 (1975), *cert. denied*, 425 U.S. 970 (1976); Parker v. Levy, 417 U.S. 733 (1974); Dash v. Commanding General, 305 F. Supp. 849 (1969), *aff'd* 429 F.2d 427 (4th Cir. 1970) (per curiam), *cert. denied*, 401 U.S. 981 (1971). *See* Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 935–36 (1963); Everett, *Military Justice in the Wake of Parker v. Levy*, 67 Mil. L. Rev. 1, 9 (1975); Brown, *Must the Soldier be a Silent Member of Our Society?* 43 Mil. L. Rev. 71 (1969).

[44] T. Emerson, The System of Freedom of Expression 57 (1970).

[45] *Id.* at 57.

[46] 417 U.S. 733 (1974).

[47] *Id.* at 743. The *Parker* Court relied on a number of earlier Supreme Court cases to the effect that "[a]n army is not a deliberative body . . .[i]ts law is that of obedience." *In re* Grimley, 137 U.S. 147, 153 (1890). In addition, the special nature of military organizations requires a "separate discipline from that of the civilian." Orloff v. Willoughby, 345 U.S. 83, 94 (1953). And finally, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . . " Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion).

military necessity.[48] In *United States v. Voorhees*,[49] a 1954 court-martial case involving a military censorship regulation, the Court of Military Appeals confronted its first major case which presented the issue of first amendment protection.[50] A servicemember had been convicted for violating an order not to publish certain portions of a book believed by his superiors to be a threat to security. While the court upheld the constitutionality of the regulation based on military necessity, it did recognize the competing first amendment values.[51] The *Voorhees* decision paved the way for later cases that expressly sanction the use of the clear and present danger test, later changed to "clear danger to loyalty, discipline or morale" in the military context.[52]

The culmination of the *Voorhees* evolutionary process came in *United States v. Priest*,[53] a case which concerned a member of the

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[48] Schlesinger v. Councilman, 420 U.S. 738, 758 (1975).
[49] 4 C.M.A. 509, 16 C.M.R. 83 (1954).
[50] *See* Sherman, *supra* note 17.
[51] 4 C.M.A. 509, 16 C.M.R. 83 (1954).

[52] In the Voorhees case, Chief Judge Quinn, writing for the court, found it unnecessary to consider the constitutionality of the "propriety" and "conformance to policy" standards set forth in the Army's regulation requiring review of material to be published by servicemembers. 4 C.M.A. at 525, 16 C.M.R. at 83. The "clear and present danger" concept is mentioned briefly in passing, by way of example only, by Judge Latimer in his opinion concurring in part and dissenting in part. 4 C.M.A. at 532, 16 C.M.R. at 106. United States v. Harvey, 19 C.M.A. 539, 543, 42 C.M.R. 141, 145 (1970); United States v. Daniels, 19 C.M.A. 529, 535, 42 C.M.R. 131, 137 (1970); United States v. Howe, 17 C.M.A. 165, 173–74, 37 C.M.R. 429, 437–38 (1967).

See Sherman, *supra* note 17 for a discussion of these cases along with the Court of Military Appeals decision in United States v. Voorhees, 42 C.M.A. 509, 16 C.M.R. 83 (1954).

[53] 21 C.M.A. 564, 45 C.M.R. 338 (1972).

The *Priest* case appears to be the last military decision which suggests that the "clear and present danger" test is the "proper standard for the governance of free speech in military law." 21 C.M.A. at 570, 45 C.M.R. at 344. Subsequent decisions of civilian courts require only that the danger be clear, not that it also be present. Note 62, *infra*.

However, the court distinguished the Supreme Court's *Brandenburg* decision, saying that this case "apparently provides the current test for the civil community in forbidding the punishment of the mere advocacy of unconstitutional change," but that "the danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained." 21 C.M.A. at 570, 45 C.M.R. at 344. The *Brandenburg* case distinguishes advocacy or "mere abstract teaching" from actual preparation of a group for violent action. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

Navy who had published a number of underground newsletters launching violent attacks on the government's war policy and calling for the overthrow of the United States government.[54] The Court of Military Appeals, in sustaining Priest's conviction for making disloyal statements, recognized that prior to this case they had "not fully delineated the limits on the right of free speech in the armed forces."[55] In an effort to do so, the *Priest* court referred to *Brandenburg v. Ohio*[56] as setting forth the appropriate standard for civilian advocacy cases, but found that in the military context the *Brandenburg* test would not be workable.[57] Because the military must rely on the discipline of its troops to insure national security, the court adopted the less rigid test advanced in *Dennis v. United States*[58] that, "In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necesary to avoid the danger."[59]

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[54] Illustrative of Priest's efforts is the following:

> Smash the state power
> To the People
> . . . .
> Free us now guns baby
> guns!
> . . . .
> Bomb America. Make
> Coca-Cola someplace else.

Id. at 567, 45 C.M.R. at 341.

[55] *Id.* at 570, 45 C.M.R. at 344.

[56] 395 U.S. 444 (1969) (per curiam). See further discussion of the Brandenburg case at note 53, *supra*.

[57] The *Priest* court relied on the basic distinctions between military and civilian society. Citing United States v. Gray, 20 C.M.A. 63, 42 C.M.R. 255 (1970), the court acknowledged that speech can have much greater detrimental effects in the military environment. Fearing a slight but continuing erosion of morale and discipline, the court stated that using the *Brandenburg* standard of "imminent lawless action" would be too large a risk. 395 U.S. at 447; note 53 *supra*.

Rather, the court believed that the military required a standard capable of stopping harmful speech before the damage was done or seriously underway. 21 C.M.A. at 570, 45 C.M.R. at 344. Thus, in military service, the danger need only be clear, not both clear and present. Note 53, *supra;* note 62, *infra*.

[58] 341 U.S. 494 (1951).

[59] *Id.* at 510. Curiously, while formulating its standard of review in the precise language used by *Dennis*, the *Priest* court explicitly stated that the test devised in Schenck v. United States, 249 U.S. 47, 52 (1919) is proper for use in the military. Apparently, to the Court of Military Appeals as it was constituted in 1972, the *Dennis* test uses merely a restatement of the *Schenck* clear and present danger test. 21 C.M.A. at 570, 45 C.M.R. at 344.

Justice Rehnquist, writing for the Court in *Parker v. Levy*,[60] has specifically endorsed the *Priest* court's reasoning.[61] A variation of the "clear and present danger test" has been applied by lower federal courts in military cases, the test of "clear danger to loyalty, discipline or morale."[62]

In *Carlson v. Schlesinger*,[63] the Court of Appeals for the District of Columbia, in a decision from which Judge Bazelon again dissented, upheld the constitutionality of another provision of AFR 35–15 banning "demonstrations or other activities within an Air Force installation . . . which present a clear danger to loyalty, discipline or morale. . . ."[64] The court was deferential to military authorities in its review of the commander's decision not to allow certain servicemembers to solicit names for an antiwar petition in the

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[60] 417 U.S. 733.
[61] *Id.* at 758.

[62] The language "clear danger to loyalty, discipline, or morale" is found in paragraph 6–4d, Army Regulation No. 210–10, Installations: Administration (12 Sept. 1977), which reads:

> If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at the installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any such publication on property subject to his/her control.

Similar language was found in paragraph 5–5e of the 30 September 1968 edition of the same regulation, first discussed in Dash v. Commanding General, 307 F. Supp. 849, 855 (1969), and later in Schneider v. Laird, 453 F.2d 345, 346 (10th Cir. 1972), among other cases. Similar language in Air Force Regulation No. 35–15 was discussed in Carlson v. Schlesinger, 511 F.2d 1327, 1332–33 (D.C. Cir. 1975).

An analogous provision concerning wall posters appeared in a drug control circular issued by U.S. Army, Europe, and was upheld in Committee for G.I. Rights v. Callaway, 518 F.2d 466 at 470 and 479 (D.C. Cir. 1975). For a civilian case dealing with related issues, *see* Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969).

Finally, the *Spock* case also permits the military services to limit first amendment rights in accordance with the standard of "clear danger to loyalty, discipline, or morale." In that case the Supreme Court considered and upheld a Fort Dix post regulation which authorized local commanders to prohibit distribution of political campaign literature in accordance with that standard. Greer v. Spock, 424 U.S. 828, 840 (1976).

[63] 511 F.2d 1327 (D.C. Cir. 1975).
[64] Dep't of the Air Force, Regulation No. 35–15, para. 3e (1).

base hospital.[65] Significantly, however, the court noted that an individualized showing had been made as to the clear danger of the petitioners' activity, and that the infringement took place in a combat zone.[66] The *Carlson* court applied a balancing standard that allowed the government an increasingly greater range of alternatives in achieving its objectives as the magnitude of the interest grew. Their holding reflected the fact that since the incident took place in a combat zone, the commanding officer was given "substantial latitude" to strike the balance required by the military exigencies.[67] The *Carlson* rationale much more closely approximates the deference afforded military decisions in time of war than it does cases not arising from combat such as *Culver*.[68]

The Supreme Court in *Greer v. Spock*,[69] its most recent case dealing with these issues, which, like *Culver*, also arose in a noncombat atmosphere, there held that a regulation allowing the installation commander to exclude political campaigners from his base was justified by legitimate governmental interests, where the commander treats all compaigners alike, and where the excluded compaigners had not submitted any of their campaign material to review as required by an installation regulation.[70] The majority con-

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[65] Three Air Force servicemembers stationed in Vietnam were arrested for distributing anti-war petitions while off duty and out of uniform but on the base. Specifically, they were arrested for failing to obtain the base commander's approval as required in Dep't of Air Force, Regulation No. 30-1(a). The court declined to second guess the commander's decision that a clear danger had been presented by their activities. The fact that the base was in a combat zone and that the servicemembers' activities had already created disturbances on the base were major factors in the court's decision. 511 F.2d at 1332-33.

[66] *Id.* at 1333.
[67] *Id.* at 1332.

[68] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayshi v. United States, 320 U.S. 81 (1943). *See* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 190 (1962), where Mr. Chief Justice Warren concedes that "there are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity."

Both *Korematsu* and *Hirabayshi* were decided during World War II. The challenged military orders had been issued in preparation for what the military believed was an imminent attack by the Japanese. Unlike *Culver*, time was of the essence, and no piercing analysis of the threat to national security could be undertaken by the Court in such circumstances.

[69] 424 U.S. 828.
[70] 424 U.S. 838-39.

cluded, "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command."[71] The Court was careful to mention that, in rejecting the campaigners' request to enter the base, the commander had undertaken an individualized scrutiny of its effect on the base. Only after deciding that, indeed, the visit would present a clear danger to the base, did he deny permission to enter.[72] Justice Powell, who concurred and joined in the Court's opinion, added that the prohibition must be narrowly construed to reach only activities that threaten the protected interests.[73] He also commented that the ban was warranted because the soldiers were not being foreclosed from attending political rallies off base.[74]

It is clear that the *Culver* decision represents a dramatic departure from the earlier military decisions. The Culver majority did not employ the test of clear danger to loyalty, discipline or morale ordinarily used in recent years by courts considering first amendment cases in the military context. Unlike the military courts in the *Voorhees* and *Priest* line of cases, and the federal courts in *Greer* and *Carlson*, the majority did not require any individualized showing of the possible danger of Culver's planned activities. This being so, the question becomes whether the government's interest in protecting against interference with foreign relations can be considered so strong as to necessitate such a departure. Even Chief Judge Bazelon, dissenting, recognized that the interest of the military in avoiding entanglement in diplomatic affairs is weighty.[75] Nevertheless, the upholding of a regulation that bans all demonstrations before the fact and makes no provision for particularized showing of harm is extreme. The gravity of the evil of disrupted international relations is great, but the likelihood is slight that off-duty and out-of-uniform soldiers carrying a petition to the local United States Embassy protesting their country's involvement in Vietnam would detrimentally affect those relations. The *Culver* facts mitigate against balancing so heavily in favor of the government.

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[71] 424 U.S. 840.
[72] *Id.* at 833 note 3.
[73] *Id* at 847.
[74] *Id.*
[75] 559 F.2d at 637.

There is merit in Judge Leventhal's admonition that the individual soldier cannot be permitted to decide which demonstrations will or will not adversely affect foreign relations.[76] This formulation of the issue, however, misstates the mechanics of the test developed in the prior cases. Under either the *Priest* test or the *Greer* rationale it is clear that the individual soldier would not be charged with balancing complex foreign policy considerations. The decision would still be made by the appropriate military authorities except that it would be done on an *ad hoc* basis rather than on a broad, sweeping one.

The deference paid to the military in Culver harkens back to the analysis, long since abandoned in civilian cases, of the Supreme Court in *Gitlow v. New York*[77] and *Whitney v. California*.[78] In *Gitlow*, the Supreme Court in an opinion by Justice Sanford upheld the constitutionality of a New York criminal anarchy statute prohibiting advocating, advising, or teaching that the government should be overthrown by force or violence. The Court emphasized that in enacting the statute the state had already struck the balance in favor of protecting against the threat of violent revolution and, therefore, did not have to wait until the speech created an imminent threat. According to the *Gitlow* Court, the speech could be proscribed without a showing of any immediate danger.[79]

Justice Sanford again delivered the Court's opinion in *Whitney*, upholding a California criminal syndicalism statute. The Court relied on *Gitlow* to sustain the conviction of a woman who had attended a Communist Party convention at which a resolution was adopted calling for the overthrow of the government. Finding that the statute was not an unreasonable or arbitrary exercise of the state's power, the Court bowed to the discretion of the legislature.[80]

The *Culver* court, in language strikingly similar to that of *Gitlow* and *Whitney*, stated that, "[i]t would be unseemly and possibly

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[76] *Id.* at 632.
[77] 268 U.S. 652 (1925), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (per curiam).
[78] 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (per curiam).
[79] 268 U.S. at 668–69.
[80] 274 U.S. at 369.

disruptive—or at least the military had the right to consider it so—for members of the military to engage in demonstrations in the host country. . . ."[81] It is surprising that this lax standard, long since overruled by the Supreme Court in *Brandenburg v. Ohio*,[82] has enjoyed a reincarnation at the hands of the *Culver* majority.

IV. *PARKER* AND *GREER* DISTINGUISHED

The *Culver* court's blanket reliance on *Parker*[83] and *Greer* may account for its failure to analyze fully all facets of the case. While the two cases are critical to an understanding of the application of the law in this area in a military setting, even a cursory review of their facts would reveal that major distinctions exist. In *Parker*, the appellee, Captain Levy, was convicted for refusing to obey a lawful order to train medics in dermatology. Levy's refusal to instruct the men stemmed from his anti-war beliefs. While making his rounds in the hospital, he would advise the patients that black soldiers should not fight in Vietnam until racial justice is achieved in the United States.[85] Significantly, the Court indicated that Captain Levy's statements urging others to disobey orders to fight would not have been protected even under civilian standards.[86] Certainly Captain Culver's involvement in the demonstration, an activity that would be protected under civilian law, is of a different order.[87] There is also a substantial difference between the military interest in controlling an officer's behavior while on base and in uniform and that interest when the officer acts in a place and manner not associable with the service.

Greer did not even involve restrictions on a servicemember. Benjamin Spock, a candidate for president on the People's Party ticket in the 1972 election, and three other candidates were denied permission to campaign on the Fort Dix military base.[88] As in *Parker*, the Court's general comments regarding the military interest may

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[81] 559 F.2d at 628.
[82] 395 U.S. 444 (1969) (per curiam).
[83] 417 U.S. 733 (1974).
[84] 424 U.S. 828 (1976).
[85] 417 U.S. at 736–37.
[86] *Id.* at 761.
[87] *See* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Brown v. Louisiana, 383 U.S. 131 (1966).
[88] 424 U.S. at 832-33.

be relevant to *Culver*, but there is no question that the Court was primarily concerned with a commander's control of the base.[89] Notwithstanding the major differences between *Greer* and *Culver*, had the court in *Culver* followed the Supreme Court in *Greer*, then the majority would have been led to the use of the standard of clear danger to loyalty, discipline, or morale.

Analytically, as well as factually, the distinctions continue. Typically, governmental interests can be broken down into two basic types.[90] The first is the need to preserve the military's autonomy over its installations and procedures. This class of cases includes control over military and civilian personnel when they are present on the base or on duty.[91] The second reaches only those persons in the armed forces and is manifested in the military's need to control its members, whether on or off duty and whether on or off the base.[92] As heretofore mentioned, *Greer* clearly involves concern for base security, and fits within the first class. There is little doubt that the campaigners would have been free to hand out literature immediately outside of the base.[93] *Parker* likewise falls within the first class of cases.

Culver, on the other hand, does not represent an attempt by the government to control an installation. Rather, it is a case falling squarely in the second category. The only other case also fitting this classification is a 1967 case arising in the Court of Military Appeals. In *United States v. Howe*,[94] a second lieutenant was charged with using contemptuous language directed at the President of the United States and with conduct unbecoming an officer and a gentleman.[95] Howe had been spotted marching in a demonstration carrying a sign calling President Johnson a fascist and calling for a halt

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[89] *Id.* at 838.

[90] Zillman & Imwinkelried, *supra* note 32, at 45. Specifically, the authors contend that a servicemember's questioning of orders or policy may erode discipline, loyalty, and morale. They also acknowledge that free speech abroad may harm diplomatic relations, and at home may threaten the civilian/military separation. *Id.* at 405–06.

[91] *See* Greer v. Spock, 424 U.S. 828 (1976); Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969).

[92] *See, e.g.*, United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967).

[93] *See* Flower v. United States, 407 U.S. 197 (1972) (per curiam).

[94] 17 C.M.A. 165, 37 C.M.R. 429 (1967).

[95] Article 88, U.C.M.J., 10 U.S.C. § 888 (1970); Article 133, U.C.M.J., 10 U.S.C. § 933 (1970). 17 C.M.A. at 167, 37 C.M.R. at 431.

to the Vietnam war. At the time he was observed, he was off duty, out of uniform, and participating in the demonstration with a group of civilians in downtown El Paso, Texas.[96] Emphasizing Howe's use of contemptuous words rather than his presence at the demonstration, the court determined that the government's interest in maintaining political neutrality was sufficient to justify the infringement on Howe's constitutional rights.[97] Nevertheless, in discussing the background of the prohibition on use of contemptuous words, the court alluded to the clear and present danger test before upholding the conviction.[98]

Thus, it would seem that the precedents of *Parker* and *Greer* do not dictate either the outcome or the analysis of the *Culver* majority. The court was free to interpret AFR 35-15 to ban only those demonstrations that posed a clear danger to international harmony. In failing so to read the regulation, the court abandoned a settled line of authority and embarked upon a new path.

In addition, the majority and the concurring opinions failed to recognize that AFR 35-15, as interpreted, is a total ban on political demonstrations. The servicemember on foreign soil is placed in a particularly difficult position by the court's reading of the regulation. If they are prohibited from demonstrating off base altogether, and the interest in preserving morale and discipline would exclude a demonstration, as it most certainly would do, on base, then the soldier stationed abroad is completely foreclosed from this mode of ex-

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[96] *Id.* at 168, 37 C.M.R. at 432.

[97] *See* Sherman, *supra* note 17 at 347. Professor Sherman, commenting upon the *Howe* case, rejects the position that uniformity of opinion is essential among soldiers, even if they are in uniform and clearly identifiable. He observes:

> The public has grown accustomed in recent years to the sight of striking or protesting teachers, policemen, and other public employees, and there seems to be increasing recognition that public employees are capable of performing their duties conscientiously while still opposing policies of their employer. Furthermore, the American political tradition, especially as expressed by the First Amendment, accepts the premise that citizens may oppose the government without forfeiting their loyalty to their country. There seems to be little basis for concluding that soldiers cannot do likewise.

Id. at 347.

[98] 17 C.M.A. at 172, 37 C.M.R. at 436.

pression. Unlike the service personnel in *Greer*, Captain Culver is not free to find alternative locations to express his particular political preferences.[99]

The effect of the court's accession to military necessity in support of the total ban effected by AFR 35-15 is closely analogous with the Supreme Court cases on prior restraints.[100] The catch phrase of military necessity has much the same ring as did the government's assertion of "national security" in *New York Times Co. v. United States*.[101] The Court's per curiam opinion in the so called "Pentagon Papers" case emphasized that the government had a "heavy burden of justification"[102] in any system of prior restraint. While the *Culver* case does not involve a prior restraint in that Culver is being completely denied the freedom to express his ideas, the notion of a heavy burden should have some validity in a situation where armed forces members do not have free access to the American public.[103]

V. VAGUENESS, OVERBREADTH AND UNDERLYING FIRST AMENDMENT RIGHTS

Implicit in Captain Culver's attack on AFR 35-15 for vagueness[104] and overbreadth[105] was the contention that, by banning all demonstrations, the Air Force had interfered with constitutionally

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[99] 424 U.S. 828, 847 (1976) (Powell, J., concurring).

[100] Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697 (1931). *See generally* Note, *Prior Restraints in the Military*, 73 Colum. L. Rev. 1089 (1973), for a discussion of the prior restraint doctrine in the military.

[101] 403 U.S. 713 (1971) (per curiam).
[102] *Id.* at 714.

[103] *See* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117 (1975), stressing the importance of insuring a public forum for diverse ideas and persons.

[104] The vagueness doctrine arises out of a concern for due process, and requires that every law be drawn narrowly to define clearly the parameters of regulations issued thereunder.

Generally, three rationales are advanced for the doctrine's existence. First, a regulation or statute that fails to give fair warning to all possible violators offends any reasonable sense of justice. Second, as the law seeks to regulate behavior, the

protected substantive rights.[106] It is clear that even if the regulation had been precisely drawn so as to avert any vagueness and overbreadth challenges, it could not intrude on Culver's freedom of expression without a showing of strong governmental and military necessity.[107] The *Culver* court declined to explore the substantive ramifications, opting instead for a myopic treatment of the vagueness and overbreadth claims. By concentrating on the factual circumstances of Culver's activities and the narrow issue of standing,[108] the court abdicated its duty to fashion a reasonable solution and obscured the more fundamental dispute.

In its treatment of the technicalities the court was undoubtedly correct. *Parker v. Levy*[109] clearly restricted the use of the vagueness and overbreadth doctrines in the military. The Supreme Court,

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courts must be ever mindful that a standardless law will cause the more cautious to steer clear of possibly prohibited behavior. This is particularly important in first amendment cases, where vague laws can chill the exercise of constitutionally protected expression. And finally, laws are made not only to regulate the citizenry, but also to provide guidance to the courts and officers who enforce them. Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 Stan. L. Rev. 855 (1974). *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971); United States v. Robel, 389 U.S. 258 (1967).

For a comprehensive review of the doctrine, *see* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

[105] The overbreadth doctrine has as its principle function the protection of the first amendment. Laws that sweep so broadly in the first amendment area that they include, or threaten to include, protected speech must be carefully scrutinized to guard against their chilling effects on protected expression.

One commentator has suggested that the overbreadth doctrine has been developed by the courts because other methods have failed. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 846 (1970).

[106] A substantive first amendment right would arise when a statute or regulation is passed that infringes on protected speech even through the law is narrow and precise. *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

[107] *See also* Procunier v. Martinez, 416 U.S. 396, 413–15 (1973), where in the prison context the Supreme Court invalidated the practice of censoring inmate mail because the government failed to show that it was necessary and essential to the purposes of the institution.

[108] 559 F.2d at 624; *Id.* at 630–31.
[109] 417 U.S. 733 (1974).

again placing emphasis on the differences between civilian and military life,[110] announced the proposition that one who can have no "reasonable doubt" as to the illegality of his or her behavior cannot attack the facial vagueness of a regulation.[111] Likewise, the doctrine of overbreadth was restricted in the military to situations where the regulation does not validly reach a "sufficiently large number" of cases.[112] The *Culver* court, content that a demonstration had occurred and that Captain Culver knew his planned activities were within the regulation, in effect concluded its analysis at this point.

Only Judge Bazelon proceeded further to probe the substantive issue of whether the complete ban on demonstrations was itself constitutional. He rejected a total ban, reasoning that such a measure was designed to serve mere administrative convenience.[113] Although he by no means viewed the risk to international relations as insubstantial, he would not allow the government to purchase freedom from this risk at such a cost to first amendment freedoms.[114] Judge Bazelon proposed a procedure by which a servicemember wishing to demonstrate could apply for permission to the base commander who, in turn, would have to substantiate a refusal.[115] Judge Bazelon's thoughtful compromise is no radical innovation. It is soundly rooted in the traditions of *Voorhees* and *Priest*.[116]

VI. CONCLUSION

The United States Court of Appeals for the District of Columbia Circuit in deferring to the government's claim of military necessity has broken with the settled line of first amendment cases. In de-

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[110] The *Parker* Court alluded to the fact that military rules had to be vague to provide flexibility. The Court noted that the military regulates aspects of life unregulated in the civilian sphere and that penalties range from administrative sanctions to death to reflect this fact. *Id.* at 749–51.

One commentator in criticizing the *Parker* rationale observed that while informal procedures are available, the vagueness of the Uniform Code can result in imprisonment as it did in Captain Levy's case. Bernard, *Structures of American Military Justice*, 125 U. Pa. L. Rev. 307, 317, 334 (1976).

[111] 417 U.S. at 757.
[112] *Id.* at 761.
[113] 559 F.2d at 637–39.
[114] *Id.* at 637.
[115] *Id* at 638–39.
[116] *See* text *supra*, above notes 48–59; 559 F.2d at 639 note 16.

clining to require an individualized showing of harm, the court has exceeded Supreme Court precedents in the military area. It is anomalous that this should occur in a case involving political dissent, the type of speech most highly protected by the Constitution.[117] It is even more paradoxical that Judge Bazelon's dissent could, by contrast with the majority, be viewed as favoring civil liberties. He merely restates a conservative standard long acknowledged by military and civilian courts as proper. Freedom of speech in the military has always been precarious.[118] After *Culver v. Secretary of the Air Force*[119] the degree of protection is even less certain.

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[117] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). Professor Bork has argued that indeed political speech is the only true speech covered by the first amendment. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 20 (1971).

[118] It has been argued that the framers of the Constitution never intended the first amendment to apply to the military. *See* Bernard, *supra* note 107 at 314; Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 Harv. L. Rev. 266 (1958). *Contra*, Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

[119] 559 F.2d 622.

BOOK REVIEW:

RULES OF THE COURT OF MILITARY APPEALS*

Fidell, Eugene R., *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals.* Washington, D.C.: Public Law Education Institute, 1978. Pp. ix, 78. Cost: $4.50.

*Reviewed by Captain (P) David A. Schlueter***

To paraphrase Gertrude Stein, a rule is a rule is a rule is a rule. How mundane! Not so, if the rules has been fashioned by the United States Court of Military Appeals. Then the "rule" is subject to limitless dissection and bisection. You will recall that for commentators the Court of Military Appeals is a bountiful field awaiting the harvest (or the blight). There have been comments on the judges' comments, comments on the cases, opinions, footnotes, the courthouse, the "new" court, and comments on efforts to do away with the court. And now . . . there are comments on the court's 1977 Rules of Practice and Procedure.[1]

For those who wish to indulge themselves in keeping pace with comments on the ever-changing court, Mr. Fidell's 78-page book may be your cup of tea. It is not what most would consider to be light reading but it does contain some insightful comments on the court's new Rules of Practice and Procedure.

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*Mr. Fidell's book was briefly noted at 82 Mil. L. Rev. 214 (1978). He is a Washington partner in the New York law firm of LeBoeuf, Lamb, Leiby, & MacRae, and served on active duty as a law specialist in the United States Coast Guard from 1969 to 1972. He currently holds the reserve rank of lieutenant commander.

**JAGC, U.S. Army. Instructor, Criminal Law Division, The Judge Advocate General's School, Charlottesville, Virginia, since 1977. Author of *The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1 (1977), and a book review published at 78 Mil. L. Rev. 206 (1977).

[1] The original rules of practice were drafted within weeks of the court's formation in 1951, and were prepared without the benefit of suggestions or comments from the practicing bar. The proposed 1977 rules received some visibility and comment. The court's staff drafted the proposed rules and presented them to an appellate advocacy conference in Washington, D.C. in 1976. Those proposed rules were adopted in large part by the court in 1977.

Why, you ask, read a book on CMA's rules? As Mr. Fidell points out, few cases have actually turned on the application or interpretation of the court's rules of practice and procedure. But for the appellate practitioner this "guide" (rules and comments to the rules) will serve as a handy tool. Drawing from Fidell's apparently complete annotations, counsel may well turn a case on a rule.

For the counsel at Fort Sticks though, as a general rule the book will be much more limited in utility. To be sure, the rules and accompanying comments on such procedures as filing petitions for grant of review or petitions for extraordinary relief may at some point prove useful. Indeed, Fidell points out that, in light of the court's expansion of powers in *McPhail*,[2] it would be "improper to assume that the court's procedures are of interest only to those assigned as appellate counsel, military judges, or others who might appear regularly before the court."

A more satisfying reason for reading this book might lie, not in the day-to-day utility of the work, but rather in that, from perusing the rules, comments, and annotations, the reader gains some insight into the subtle workings and thinking of the United States Court of Military Appeals. Much has been made of the court's footnote law—the ability to change years of practice and procedure, both trial and appellate, through footnotes in its opinions. Perhaps like attention should be paid to CMA's rule-making powers and the exercise of those powers.

Here is where Fidell's book merits reading. He has not only caught potential conflicts or inconsistencies in the rules themselves but also provides some insight into the court's postures of recent vintage, such as its writ powers and the role of counsel. In its new rules, one can sense the direction of the court. Without expanding the powers of the court through his own comments, Fidell shows us where subtle changes in the rules represent attempts to indirectly expand the court's powers or bless existing expansionistic case law.

For example, Rule 3 (Jurisdiction) will, according to Fidell, be viewed as "the most far-reaching of the 1977 rules." The new rule

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[2] 1 M.J. 457 (CMA 1976). Although the court may now have a more restricted view of its extraordinary writ powers (*see* Stewart v. Stevens, 5 M.J. 220 (Misc. Docket, 8 June 1978)), the court nonetheless possesses and exercises those powers. Although the court may have limited the number of occasions in which it will make use of the appropriate rules, the rules themselves still stand.

provides for review of "cases" rather than "the record in . . . cases." So? you ask. So, says Fidell, this revised rule "leaves no doubt that the court will apply an expansive vision of its power to do justice—without feeling cramped by the limits of either the issues framed by the litigants or the four corners of the record." Other rules bear out the continuing theme of expansion of powers. Reading the rules and Fidell's comments is much more interesting when one picks up this common thread.

Although the bulk of the book is limited to the presentation of the rules and the comments thereon, Mr. Fidell has included some remarks in the last pages on the subjects of additional rule-making and reform of the rule-making process. Using the Federal Rules of Appellate Procedure as a template, Fidell envisions additional areas potentially covered by CMA rules. (More rules?) He also envisions, and encourages, formation of a standing advisory committee on procedural rules, using civilian systems as models. In Fidell's estimation, the past process of exposing the proposed rules to a narrow audience was inadequate. Publishing the proposed rules in a variety of forums, according to Fidell, would enlarge the audience and increase the quantity of constructive suggestions and comments.

On the whole, the book is well written. And for the most part Fidell manages to hold to a middle-of-the-road approach. Here and there, however, one is left with the impression that he favors an aggressive Court of Military Appeals, and that it is the *Manual for Courts-Martial* and the Courts of Military Review (at least in the area of procedural rules) that should be brought in line with the new CMA rules.

"The gods have their own rules."

Ovid, Metamophoses IX, 500

BOOK REVIEW:

FORENSIC MEDICINE

C. G. Tedeschi, William G. Eckert, and Luke G. Tedeschi, editors, *Forensic Medicine*. Philadelphia, Pa: W. B. Saunders Co., 1977. Three volumes. Pp., vol. I, xxxii, pp. 1–784; vol. II, xxv, pp. 785–1160; vol. III, xxvi, pp. 1161–1680. Subject index in each volume. Cost: vol. I, $45.00; vol. II, $30.00; vol. III, $35.00, set of all three, $98.00.

*Reviewed by Major Percival D. Park.**

Scientific evidence is probably best known for its application in the investigation of crimes of violence. However, its usefulness is much more broad, extending to a wide variety of tort cases and medical claims procedures. *Forensic Medicine* is a work well adapted to assist the attorney practicing in these areas to find his way through the welter of conflicting evidence.

This mammoth work opens with a definition of forensic medicine, "the application within jurisprudence of medical knowledge and the findings of its underlying sciences to the solution of questions of law."[1] Forensic medicine is, then, a meeting ground for two very different disciplines, medicine and law, and it is appropriate that this three-volume work contains contributions from dozens of lawers, physicians, and other professionals from all over the United States and several foreign countries.

The sheer bulk of this work justifies its division into three large volumes. The first is entitled "Mechanical Trauma"; volume II, "Physical Trauma"; and the last volume "Environmental Hazards."

*JAGC, U.S. Army. Editor, *Military Law Review*, 1977 to present. Author of *Settlement of Claims Arising From Irregular Procurements*, 80 Mil. L. Rev. 220 (1978).

Grateful acknowledgement is made of the assistance of Major Adrian J. Gravelle, Instructor, Criminal Law Division, Judge Advocate General's School, Charlottesville, Virginia, 1976–79, in preparing this review. *Forensic Medicine* was briefly noted at 82 Mil. L. Rev. 225 (1978).

[1] 1 *Forensic Medicine* xi.

The entire work is divided into two large sections. The first deals with trauma, defined as "an injury (for instance, a wound) inflicted by a force upon a living tissue."[2] The trauma section, in six numbered parts, completely fills the first two volumes. The second section, "Environmental Hazards," fills the third volume, in four parts. The chapters are numbered consecutively from 1 to 83 through both sections and all ten parts. Each chapter has at least one named author, like a separate article.

In general, then, the first two volumes on trauma focus on types of wounds and injuries, whereas the last deals with sources of injuries. But there is necessarily much overlap between the two approaches to the subject of forensic medicine.

Volume I opens with an introductory chapter on wounds, followed by a chapter on timing of the wound. Chapter 3 is the longest in the entire work, dealing in fifteen subchapters with assessment of wounds in all the body's major organ systems. There follow several chapters on a variety of topics including pregnancy, prenatal injuries, self-inflicted wounds, and child battering. A group of four chapters deals with injuries caused by firearms, bombs, and explosives. Still other chapters deal with injuries from high or low atmospheric pressure, electrical force, radiation, heat and fire, and ultrasound.

The second volume contains the remaining five numbered parts dealing with trauma. Part II concerns injuries by chemical agents, such as poisons, alcohol, drugs, and carbon monoxide. A chapter on blood identification is included here. Part III deals with crash injuries, emergency medical care, and accidents in home and hospital. Part IV, the shortest part, considers sex crimes, including rape. The fifth part contains ten chapters on death, covering such topics as organ transplantation, autopsies, sudden death in infants, and various types of post mortem injuries. Finally, volume II closes with a three-chapter part on examination of human remains, covering forensic anthropology, odontology, and roentgenology.

Volume III concerns environmental hazards of all types, focussing more on the source of injuries than on the injuries produced. Part I deals with industrial and agricultural hazards, and contains chapters

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[2] *Id.*, at 3.

on such topics as the fishing industry, high-pressure equipment, laboratory hazards, coal mining, and railway hazards. The second part considers medical hazards involving drugs, surgery, and anesthesia. Part III, the longest part of this volume, contains fifteen chapters on specified types of environmental hazards, such as high altitudes, drowning, fungi and bacteria, parasites, land and marine animals, including snakes and insects, and poisonous plants, and various types or aspects of food poisoning. The volume closes with seven chapters setting forth general legal theories pertinent to trauma and hazards, including negligence, malpractice, products liability, causation, damages, informed consent, and workmen's compensation claims.

The three main editors all have had experience in forensic medicine. Cesare G. Tedeschi, deceased, was clinical professor of pathology at the Boston University School of Medicine, and director of medical education at the Framinghan Union Hospital, Framingham, Massachusetts. William G. Eckert is editor of INFORM, the journal of the International Reference Organization in Forensic Medicine and Science, and holds a number of medical and academic posts besides. Luke G. Tedeschi is director of laboratories at the Framingham Union Hospital, and is associate professor of pathology at the Boston University School of Medicine.

This three-volume work, *Forensic Medicine*, is of excellent quality, better than many other such works on the market. It may not be needed in minimum-function-inventory Army law libraries, but offices having larger libraries should consider obtaining it if they do work related to forensic medicine.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and in Section III, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

II. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

ALI/ABA, *The Trial of a Civil Action in the Federal Courts and the Prosecution and Defense of Federal Criminal Cases* (No. 1).

American Law Institute-American Bar Association Committee on Continuing Professional Education, *The Trial of a Civil Action in*

the Federal Courts and the Prosecution and Defense of Federal Criminal Cases (No. 1).

Atlantic Council Working Group on Securing the Seas, Paul H. Nitze, and Leonard Sullivan, Jr., *Securing the Seas: The Soviet Naval Challenge and Western Alliance Options* (No. 22).

Barry, Donald D., George Ginsburgs, and Peter B. Maggs, editors, *Soviet Law After Stalin, Part I: The Citizen and the State in Contemporary Soviet Law* (No. 2).

Barry, Donald D., George Ginsburgs, and Peter B. Maggs, editors, *Soviet Law After Stalin, Part II: Social Engineering Through Law* (No. 3).

Betts, Richard K., and Leslie H. Gelb, *The Irony of Vietnam: The System Worked* (No. 10).

Bhatia, H. S., editor, *Civil & Military Law Journal* (No. 4).

Bhatia, H. S., editor, *Martial Law: Theory and Practice* (No. 5).

Blaustein, Albert P., et al., *The Military in American Society* (No. 27).

Boyd, John A., *Digest of United States Practice in International Law, 1977* (No. 6).

Department of the Army, *Pamphlet No. 27–11, Army Patents* (No. 7).

Faw, Duane L., et al., *The Military in American Society* (No. 27).

Galloway, L. Thomas, *Recognizing Foreign Governments: The Practice of the United States* (No. 8).

Gaynor, James K., *Lawyers in Heaven* (No. 9).

Gelb, Leslie H., with Richard K. Betts, *The Irony of Vietnam: The System Worked* (No. 10).

Gianelli, Paul C., Edward J. Imwinkelried, Francis A. Gilligan, and Fredric I. Lederer, *Criminal Evidence* (No. 14).

Gilligan, Francis A., Edward J. Imwinkelried, Paul C. Gianelli, and Fredric I. Lederer, *Criminal Evidence* (No. 14).

Ginsburgs, George, Donald D. Barry, and Peter B. Maggs, editors, *Soviet Law After Stalin, Part I: The Citizen and the State in Contemporary Soviet Law* (No. 2).

Ginsburgs, George, Donald D. Barry, and Peter B. Maggs, editors, *Soviet Law After Stalin, Part II: Social Engineering Through Law* (No. 3).

Goldsmith, Lee S., editor, et al., *The Journal of Legal Medicine* (No. 11).

Herskowitz, Mickey, and Leon Jaworski, *Confession and Avoidance* (No. 15).

Higginbotham, A. Leon, Jr., *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (No. 12).

Holt, Pat M., *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention* (No. 13).

Inwinkelried, Edward J., Paul C. Gianelli, Francis A. Gilligan, and Fredric I. Lederer, *Criminal Evidence* (No. 14).

Jaworski, Leon, with Mickey Herskowitz, *Confession and Avoidance* (No. 15).

Johnson, Stuart E., with Joseph A. Yager, *The Military Equation in Northeast Asia* (No. 16).

Karsten, Peter, *Soldiers and Society: The Effects of Military Service and War on American Life* (No. 17).

Larkin, Murl A., et al., *The Military in American Society* (No. 27).

Lederer, Fredric I., Edward J. Imwinkelried, Paul C. Gianelli, and Francis A. Gilligan, *Criminal Evidence* (No. 14).

LeFever, Ernest W., *Nuclear Arms in the Third World* (No. 18).

Levi, Werner, *Contemporary International Law: A Concise Introduction* (No. 19).

Levie, Howard S., *Prisoners of War in International Armed Conflict, Volume 59 of the International Law Studies* (No. 20).

Lewis, John R., *Uncertain Judgment: A Bibliography of War Crimes Trials* (No. 21).

Maggs, Peter B., Donald D. Barry, and George Ginsburgs, editors, *Soviet Law After Stalin, Part I: The Citizens and the State in Contemporary Soviet Law* (No. 2).

Maggs, Peter B., Donald D. Barry, and George Ginsburgs, *Soviet Law After Stalin, Part II: Social Engineering Through Law* (No. 3).

Munster, Joe H., Jr., et al., *The Military in American Society* (No. 27).

Nitze, Paul H., Leonard Sullivan, Jr., and the Atlantic Council Working Group on Securing the Seas, *Securing the Seas: The Soviet Naval Challenge and Western Alliance Options* (No. 22).

Paust, Jordan J., et al., *The Military in American Society* (No. 27).

Peckham, Robert D., et al., *The Military in American Society* (No. 27).

Rakas, Albert S., et al., *The Military in American Society* (No. 27).

Schwartz, Victor E., *Comparative Negligence* (No. 23)

Seidel, Arthur H., *What the General Practitioner Should Know About Trademarks and Copyrights* (No. 24).

Sherman, Edward F., et al., *The Military in American Society* (No. 27).

Stockholm International Peace Research Institute, *Statement on World Armaments and Disarmament* (No. 25).

Sullivan, Leonard, Jr., Paul H. Nitze, and the Atlantic Council Working Group on Securing the Seas, *Securing the Seas: The Soviet Naval Challenge and Western Alliance Options* (No. 22)

Yager, Joseph A., and Stuart E. Johnson, *The Military Equation in Northeast Asia* (No. 16).

Zellick, Graham, *European Human Rights Reports* (No. 26).

Zillman, Donald N., et al., *The Military in American Society* (No. 27).

III. TITLES NOTED

Army Patents, Pamphlet No. 27-11, *prepared by Department of the Army* (No. 7).

Civil & Military Law Journal, *edited by H. S. Bhatia* (No. 4).

Comparative Negligence, *by Victor E. Schwartz* (No. 23).

Confession and Avoidance, *by Leon Jaworski with Mickey Herskowitz* (No. 15).

Contemporary International Law: A Concise Introduction, *by Werner Levi* (No. 19).

Criminal Evidence, *by Edward J. Imwinkelried, Paul C. Gianelli, Francis A. Gilligan, and Fredric I. Lederer* (No. 14).

Digest of United States Practice in International Law 1977, *by John A. Boyd* (No. 6).

European Human Rights Reports, *by Graham Zellick* (No. 26).

In the Matter of Color: Race and the American Legal Process: The Colonial Period, *by A. Leon Higginbotham, Jr.* (No. 12).

Irony of Vietnam: The System Worked, *by Leslie H. Gelb, with Richard K. Betts* (No. 10).

Journal of Legal Medicine, *edited by Lee S. Goldsmith, et al.* (No. 11).

Lawyers in Heaven, *by James K. Gaynor* (No. 9).

Martial Law: Theory and Practice, *edited by H. S. Bhatia* (No. 5).

Military Equation in Northeast Asia, *by Stuart E. Johnson with Joseph A. Yager* No. 16).

Military in American Society, *by Donald N. Zillman, Albert P. Blaustein, Edward F. Sherman, Duane L. Faw, Murl A. Larkin, Joe H. Munster, Jr., Jordan J. Paust, Robert D. Peckham, and Albert S. Rakas*(No. 27).

Nuclear Arms in the Third World, *by Ernest W. LeFever* (No. 18).

Pamphlet No. 27-11, Army Patents, *prepared by Department of the Army* (No. 7).

Prisoners of War in International Armed Conflict, Volume 59 of the International Law Studies, *by Howard S. Levie* (No. 20).

Recognizing Foreign Governments: The Practice of the United States, *by L. Thomas Galloway* (No. 8.)

Securing the Seas: The Soviet Naval Challenge and Western Alliance Options, *by Paul H. Nitze, Leonard Sullivan, Jr., and the Atlantic Council Working Group on Securing the Seas* (No. 22).

Soldiers and Society: The Effects of Military Service and War on American Life, *by Peter Karsten* (No. 17).

Soviet Law After Stalin, Part I: The Citizen and the State in Contemporary Soviet Law, *edited by Donald D. Barry, George Ginsburgs, and Peter B. Maggs* (No. 2).

Soviet Law After Stalin, Part II: Social Engineering Through

Law, *edited by Donald D. Barry, George Ginsburgs, and Peter B. Maggs* (No. 3).

Statement on World Armaments and Disarmament, *prepared by Stockholm International Peace Research Institute* (No. 25).

Trial of a Civil Action in the Federal Courts and the Prosecution and Defense of Federal Criminal Cases, *prepared by American Law Institute-American Bar Association Committee on Continuing Professional Education* (No. 1).

Uncertain Judgment: A Bibliography of War Crimes Trials, *by John R. Lewis* (No. 21).

War Powers Resolution: The Role of Congress in U.S. Armed Intervention, *by Pat M. Holt* (No. 13).

What the General Practitioner Should Know About Trademarks and Copyrights, *by Arthur H. Seidel* (No. 24).

IV. PUBLICATIONS NOTED

1. American Law Institute—American Bar Association Committee on Continuing Professional Education, *The Trial of a Civil Action in the Federal Courts and the Prosecution and Defense of Federal Criminal Cases.* Philadelphia, PA: ALI-ABA, 1976–78. Audiocassettes in two series. See description below. Cost: first series: $375.00, plus $10.00 for postage and handling; second series: $320.00, plus $10.00 for postage and handling. Individual numbers within each series are separately available for $20.94 for two-cassette sets and $9.48 for one-cassette sets. Each cassette is one hour long. Some are accompanied by photocopied study materials.

As part of its continuing legal education program, the Association of the Bar of the City of New York has sponsored series of lectures on trial advocacy. Two of these series, the first given from September 1976 to June 1977, and the second from January to June 1978, were recorded.

The first series consists of twenty titles, numbered from V400 to V419. The titles range from "The Need for Post-Admission Training in Trial Advocacy and Selected Problems of Pleading in the Federal Courts," through "Sentencing." Titles between these two include "Discovery," "Readying the Case for Trial," "Presumptions, Opinions and Expert Testimony," "The Objectives and Techniques of Cross-Examination," "The Appeal," and others. Each of the twenty titles consists of two cassettes each one hour in length. Thus, the entire first series consists of forty hours of lectures. Each two-cassette set is priced at $20.94. The total price of $375.00 (plus $10.00 for postage and handling) thus represents a savings over the total price of all the sets bought separately, $418.80.

The second series, consisting of eighteen titles, is described as being a little more advanced than the first series. Its titles, numbered from V436 through V453, range from "A Judge's Overview of Some Helpful Techniques and Skills in a Civil Action," to "Post Trial Motions; Sentencing Procedures, Statutes; Appeals and Appellate Procedure." Included are titles such as "Avenues to Speedy Disposition," "Trial of an Environmental Action," "Special Problems of Grand Jury Investigations," "Communicating with the Jury," and "Problems of Electronic Surveillance; The Speedy Trial Act." The price of $320.00 (plus $10.00 for postage and handling) compares favorably with the price of $342.54 for all the titles purchased individually. Three of the titles consist of only one cassettee each.

The lecturers heard on the tapes are practicing attorneys, judges, and law professors.

Seven titles in the first series and three in the second are accompanied by study materials, usually extracts from rules or statutes, or lists of cases. These vary in length. They are xeroxed or photocopied.

2. Barry, Donald D., George Ginsburgs, and Peter B. Maggs, editors, *Soviet Law After Stalin, Part I: The Citizen and the State in Contemporary Soviet Law.* Leyden, The Netherlands: A. W. Sijthoff International Publishing Company BV, 1977. Pp. xv, 303.

This book, one of a three-part, three-volume set, is a collection of essays dealing with various aspects of Soviet criminal and civil law

as it has developed since the death of Joseph Stalin in 1953. The general thrust of these articles, according to a preface by Professor John N. Hazard of the Columbia University School of Law, is to show how modern Soviet law has blended traditional elements with Marxist view-points. Under Stalin, predictability in law totally disappeared. Although a return to czarist law would have been acceptable, Soviet society could not advance without a system for regulating social relationships which at least broadly resembled the civil law systems of the rest of continental Europe.

The authors of the essays found in this first part of *Soviet Law After Stalin* met in a conference held in New York in November 1975 to decide how to divide up the labor of assessing contemporary Soviet law. A year later they presented the results of their efforts at a meeting sponsored by the Association of the Bar of the City of New York. The set of volumes of which this is the first were the eventual outcome.

The book opens with essays on Soviet housing law and corrective labor law, two areas in which Soviet law probably differs most from the other legal systems of western Europe. There follow essays on Soviet court reform of the late 1950's, the right of the individual defendant to have counsel in ordinary criminal cases, and domestic relations law. The book also contains essays on the legal status of collective farm members, due process and civil rights cases, and criminal law protection of socialist property. The volume is concluded with an article on soviet law concerning job security.

The authors of the ten essays in this volume were all participants in the two conferences which led to the production of the entire set of three volumes. Most of them are professors of law at various American universities.

For the use of the reader, the book provides a detailed table of contents, a table of abbreviations, a preface, an introduction, a short appendix discussing "the framework for analysis," and a subject-matter index. Footnotes are grouped together at the ends of the articles to which they pertain.

3. Barry, Donald D., George Ginsburgs, and Peter B. Maggs, editors, *Soviet Law After Stalin, Part II: Social Engineering*

Through Law. Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1978. Pp. xiv, 335.

This work is a collection of twelve essays covering new developments in most areas of Soviet law during the past quarter-century. They were originally presented during October of 1977 at a meeting of the Association of the Bar of the City of New York. The book is the second of a set of three volumes on modern Soviet law, the contents of the other two volumes come from other sources.

The first three of the twelve essays set forth herein deal with the Soviet constitution of 1977, work on which had been commenced under Khruschev in 1962. One of these articles was prepared by Professor John N. Hazard, whose lecture, *International Law Under Contemporary Pressures*, was published in volume 83 of the *Military Law Review*.

Later essays cover such topics as international commercial law, law and economic change, automobile law, consumer product quality, family law, administrative law, judicial review, the procuracy, and economic crimes. The final essay briefly reviews the policies of Khruschev and Brezhnev concerning law and legal institutions.

Aids for the reader are a detailed table of contents, a table of abbreviations, a general introduction, and a subject-matter index. Footnotes are collected together at the end of each article.

The editors and contributors were all participants in the October 1977 conference and in related academic endeavors. Among the conferees was Major Eugene D. Fryer of the International Law Division at The Judge Advocate General's School, Charlottesville, Virginia, author of an article, *Soviet International Law Today: An Elastic Dogma* published in volume 83 of the *Military Law Review*.

This book is part II of volume 20 in a series entitled "Law in Eastern Europe," prepared by the Documentation Office of East European Law at the University of Leyden in the Netherlands. General editor for the series is F. J. M. Feldbrugge.

4. Bhatia, H.S., editor, *Civil & Military Law Journal*. New Delhi,

India: Deep & Deep Publications. Vol. 14, Nos. 1 and 2, Jan.–June 1978. Pp. 74. Cost: Indian rupees 110.00

This periodical describes itself as "India's first and only quarterly on the rule of law, military jurisprudence and legal aid." Its purposes include informing Indian citizens of new developments in the law, advocating changes in the law deemed beneficial by the editor, and promoting international good will. It is not particularly addressed to lawyers, and its style tends to be popular rather than scholarly.

The range of subject matter of articles in this journal appears to be unlimited, except that all deal with law in some manner. The issue under examination contains two historical articles, "Law Officer Jailed for Not Disclosing Government Secrets," about a case which arose in 1779, and "Abolution of Corporal Punishment in the Native Army," a report and recommendations prepared by a British official in 1835. Comparative law is represented by an essay entitled, "Constitutional and Socio-Political System in Yugoslavia."

The *Journal* continues with a case note, "Prime Minister Indira Gandhi's Election Case." The article called "Thoughts of Gandhiji" is a collection of quotations from the writings of Mahatma Gandhi. An essay called "Fundamental Rights and Directive Principles," concerning Indian constitutional law, and two short book reviews complete the issue.

The *Civil & Military Law Journal* is advertised as a quarterly, but this issue covers the first two quarters of calendar year 1978. It is designated volume 14, nos. 1 and 2; also nos. 53 and 54, from the founding of the *Journal*. Apparently this publication first appeared in 1964.

The founder and editor of the *Journal* is an Indian attorney, H. S. Bhatia of New Delhi. The *Journal* is sponsored by an organization called the Defence Employees Welfare Council. The *Journal* in turn sponsors a legal aid bureau for Indian military personnel.

5. Bhatia, H. S., editor *Martial Law: Theory and Practice.* New Delhi, India: Deep & Deep Publications. 1979. Pp. 240. Cost: $13.00.

Martial law, in the sense of the law which is applied when military authorities take over the functions of civilian government, is a sub-

ject less familiar to Americans than it is to the people of many other countries. Bhatia's *Marital Law* gives us an Indian point of view on the subject.

This book is a collection of essays by various authors. It is organized into thirteen chapters. The first six chapters deal mainly with theoretical questions, such as the meaning and scope of martial law; the place of martial law in English jurisprudence; the bases of and justification for imposition of martial law; and allocation of responsibility for implementing martial law. This is followed by a short chapter on bills of indemnity, which, the author explains, have often been passed by various governments after the end of martial rule to protect the former military rulers from liability for their actions.

The next five chapters discuss the history of martial law. One of them reviews the administration of martial law in the United States. The others all concern martial law in India under the British during the nineteenth and early twentieth centuries. This section is followed by a long chapter on martial law in Pakistan during the 1970's. The book closes with an essay on the constitutionality of martial law as imposed in the Philippines during the past decade.

The editor, H. S. Bhatia, is an Indian attorney and former ordnance officer in the Indian Army. He is editor of the *Civil and Military Law Journal*, and has published a number of other writings.

The book has a table of contents, a foreward written by the attorney general of India, a preface, a glossary of important technical terms, a bibliography, and a subject-matter index. Footnotes are grouped together at the ends of such of the articles as have them.

6. Boyd, John A., *Digest of United States Practice in International Law 1977*. Washington, D.C.: U.S. Government Printing Office, 1979. Pp. xxiii, 1158.

This work is an annual publication of the U.S. Department of State, and is the fifth consecutive issue of the series. Its purpose is stated in its introduction. It "attempts to publish the significant materials relating to international legal practice in the contemporary record of Federal legislation and regulations, treaties and executive

agreements, Federal court decisions, testimony and statements before congressional and international bodies, speeches, diplomatic notes, correspondence, and internal memoranda."

The 1977 edition is divided into fifteen chapters. The first six chapters are introductory and basic in scope. Covered are states and international organizations as subjects of international law, the individual in international law, state representation, territory, jurisdiction, and immunities, and the law of treaties and other international agreements.

The next half-dozen chapters deal with topics and areas of law that have taken on increasing importance since World War II. These topics are the cutting edge of international law in many respects. Covered are law of the sea, aviation and space law, state responsibility for injuries to aliens, international economic law, and environmental, health, scientific, educational, and cultural affairs.

The last three chapters of the book are more traditional in their coverage. These chapters deal with peaceful settlement of disputes, legal regulation of the use of force, and, very briefly, new developments in private international law.

Aids for the reader include an introduction, a detailed table of contents preceded by a summary of the contents, an appendix setting forth the text of the sovereign immunity decisions of the Department of State from 1952 to 1977, a table of cases cited in this appendix, and a detailed index. Each chapter is divided into numbered sections.

The first issue of the Digest was issued for the year 1973, and was authorized by Arthur W. Rovine, an attorney within the Office of the Legal Advisor of the Department of State. The issue for 1977 was prepared by John A. Boyd, also of the Department of State. This new series replaces previous compilations, including Whiteman's *Digest of International Law*, published in fifteen volumes during the 1960's, and Hackworth's eight-volume *Digest* published in the 1940's. The annual-volume approach was adopted because international law has been growing and changing so much in recent decades that a digest in the older format became outdated too rapidly.

7. Department of the Army, *Pamphlet No. 27–11, Army Patents.* Washington, D.C.: Department of the Army, 1979. Pp. vi, 22.

This official publication is addressed to Department of the Army military and civilian personnel who may develop patentable inventions either in the course of their work or outside it. Organized in sixteen short chapters, the pamphlet tries to explain in simple terms the uses of patents and the procedures for obtaining them. Such matters as patent searching, interference proceedings to deal with competing claims for organization of an invention, and patent infringement are covered. Some information concerning copyrights and trademarks is also provided.

The pamphlet encourages Army inventors to disclose their inventions to the government, regardless of whether title to the inventions belong to the inventor or the government. If title belongs to the inventor, the Army will, under some circumstances, provide the services of patent attorneys free of charge to handle the patent application formalities.

The pamphlet is liberally decorated with cartoon-type illustrations in support of various points made in the text. Appendix A is a sample form for disclosure of inventions, for use by inventors who elect to seek Army assistance in patenting their inventions. Appendix B is a list of the addresses of three major Army patent offices.

The pamphlet was prepared by attorneys within the Intellectual Property Division of the Office of the Judge Advocate General, Department of the Army.

8. Galloway, L. Thomas, *Recognizing Foreign Governments: The Practice of the United States.* Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978. Pp. xiv, 191. Cost: $4.75.

This book, an AEI foreign policy study, provides a description of the theories and practices followed by the United States in extending or withholding recognition of other national governments. President by president and region by region, the shifts and the continuities in United States action are charted. There is a discussion of the so-called Estrada Doctrine, according to which a state recognizes only other states, and not governments, thereby sidestepping

the problem of legitimacy of particular governments. To some extent, the book measures United States practice against this doctrine.

The book is organized in six chapters. The first chapter, "Historical Background," outlines the practices of the United States between 1780 and 1960. Twentieth century practice is emphasized, and the chapter concludes with the Eisenhower administration.

Chapter 2 discusses recognition policy under John F. Kennedy, 1961–63. That administration differed from others in trying to promote constitutional government, and to discourage dictatorship, by granting or withholding recognition. Chapters 3 and 4 trace the evolution of United States policy under the Johnson, Nixon, and Ford administrations away from the Kennedy approach, in a more pragmatic direction.

Current United States practice, as summarized by the author, is to place emphasis not on formal recognition or nonrecognition, but on whether to continue diplomatic relations, a simpler and more pragmatic consideration. The United States does not espouse the Estrada Doctrine, but in practice we tend increasingly to behave as if we did accept it.

The fifth chapter looks briefly at the recognition practices of other states, and chapter 6 offers suggestions for future United States policy on the subject.

Appendix A sets forth in tabular form information about the recognition practices of various states. The three-part Appendix B analyzes United States practices of the past two decades, and the reasons therefore.

The author, L. Thomas Galloway, is a public interest lawyer at the Center for Law and Social Policy, Washington, D.C.

The American Enterprise Institute for Public Policy Research was founded in 1943. It describes itself as "a publicly supported, non-partisan research and educational organization," whose "purpose is to assist policy makers, scholars, businessmen, the press and the public by providing objective analysis of national and international issues."

The Galloway book has a table of contents, a foreward written by Professor R. R. Baxter of Harvard Law School, a preface, and a bibliography, in addition to the appendices mentioned above.

9. Gaynor, James K., *Lawyers in Heaven.* Philadelphia, Pa.: Dorrance & Co., 1979. Pp. 92.

This curious book is a collection of stories and biographical sketches of seventy people who had some connection with the law, and who have been either canonized or beatified within the Roman Catholic Church. Included are some who practiced law or served as judges or legislators. Others studied law but never practiced it. Still others are associated with law reform or with promotion of justice in the courts. A few of the better-known names are Saint Thomas Acquinas, Saint Thomas More, King Louis IX of France, Pope Gregory the Great, and Saint Thomas à Becket.

The author's purpose in writing the book was to promote the reputation of lawyers in general, which became somewhat tarnished during the Watergate era.

The author, James K. Gaynor, served on active duty in the Army Judge Advocate General's Corps until his retirement in 1967. He retired a second time in 1977, from a professorship at the law school of Northern Kentucky University.

The book is organized into thirty-three short chapters, some dealing with one person, others with several who have some relationship with each other, or some point of biography in common. The book closes with a table of commemorative dates, or feast days, for all the canonized and beatified figures discussed in the book.

10. Gelb, Leslie H., with Richard K. Betts, *The Irony of Vietnam: The System Worked.* Washington, D.C.: The Brookings Institution, 1979. Pp. xii, 387. Cost: $5.95.

In this work, the authors argue that, contrary to the views of other analysts, the American foreign policy decision-making system did work efficiently for the purposes for which it was used during and before the Vietnam war. That is to say, the six consecutive presidents who developed our Vietnam policies did receive realistic and generally pessimistic assessments from their subordinates of

the chances and costs of achieving a satisfactory outcome in Vietnam. The reasons for pressing on in spite of such assessments may be questioned, but they do not indicate a failure of the decision-making system.

The book is organized into five parts and thirteen chapters. Part One, "Decisions: Getting into Vietnam," contains the first five chapters. The opening chapter, "Patterns, Dilemmas, and Explanations," develops the authors' basic propositions, that United States officials were fully aware of the difficulties and costs of keeping Vietnam from going communist, but felt it necessary to make the effort to serve values beyond Vietnam itself; and that, once the basic commitment of support was undertaken, withdrawal became progressively more difficult until Congress finally puts limits on funding and use of bombing. The other chapters of Part One describe the history of our Vietnam policies up through the Johnson administration.

Part Two, "Goals: The Imperative Not to Lose," contains three chapters describing the stakes for national security and domestic policies as perceived at higher levels of the governmental bureaucracy. The third part consists of two chapters discussing the means of achieving stated goals, strategies for winning, and pressures pro and con on the presidents concerning our Vietnam involvement. The fourth part discusses perceptions of our chances of achieving a favorable outcome in Vietnam: optimism, pessimism, their effects on estimates, and the strategy of perseverance. The final part sets forth the authors' conclusions concerning Vietnam.

Leslie H. Gelb, a former senior fellow in the Brookings Foreign Policy Studies program, at one time directed the Pentagon Papers project for the Defense Department. He is now director of politico-military affairs in the Department of State. Richard K. Betts was a member of the faculty at Harvard University and subsequently became a Brookings research associate.

The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally." The purposes of the Institution are stated to be "to aid in the development of sound public policies and to promote public understanding of issues of national importance."

The book provides for the reader a table of contents, list of abbreviations, introduction, a short documentary appendix, a bibliographical note, and a subject-matter index.

11. Goldsmith, Lee S., editor et al., *The Journal of Legal Medicine.* Chicago, IL: American College of Legal Medicine. Vol. 1, no. 1, April 1979. Pp. 139. Quarterly. Cost: Annual subscription, $15.00; single issues, $3.00.

The first issue of this new periodical contains four articles on topics of legal medicine. The first describes a program for the study of legal medicine at the Southern Illinois School of Medicine. The second article is a review of "good Samaritan" laws in the various states, which protect health care professionals from liability for torts committed while giving emergency treatment. This article includes an appendix summarizing the laws of the various states on the subject.

The third article deals with problems of incompetency, with emphasis on the distinctions between forced hospitalization and appointment of guardians. The last article focuses on the ethical and legal considerations affecting compensation of people who are injured as a result of medical experiments.

The *Journal* includes a table of contents. Footnotes are grouped together at the ends of articles.

12. Higginbotham, A. Leon, Jr., *In the Matter of Color: Race and the American Legal Process: The Colonial Period.* New York: Oxford University Press, 1978. Pp. xxiii, 512. Cost: $15.00

This work of legal history reviews the state of the law concerning slaves and slavery in 17th and 18th-century America. There is some follow-up in the nineteenth century for purposes of comparison.

The book is organized in four parts and eleven chapters. Part One contains an introductory chapter setting forth the problem to be dealt with, and the author's viewpoint and methodology. Part Two, "The Black Experience in Colonial America," is the heart of the book, providing a colony-by-colony review of legislative enactments and judicial decisions concerning slavery. Six colonies are covered:

Virginia, Massachusetts, New York, South Carolina, Georgia, and Pennsylvania.

The laws varied in details from one colony to another, and at different times within the same colony. For example, the colonial government of Georgia initially opposed slavery, while Pennsylvania, originally as strongly pro-slavery as other colonies, eventually became a leading free state. There were variations from the pattern of slavery, such as indentured servitude. All this is set forth with a wealth of detail, in the form of quotations from statutes, speeches, court decisions, and other documents of the time.

Part Three discusses the experience of Great Britain with slavery. Primary attention is given to the *Sommersett* case, in which Lord Mansfield, sitting as judge, held that an escaped slave could not be reenslaved in England by his master, who had followed him there. The Fourth Part discusses the American Revolution and the contradictions between freedom and slavery which underlay the Declaration of Independence. A short epilogue concludes the book.

Aids for the reader include a summary of contents, a detailed table of contents, an appendix entitled, "A Note on the Indentured Servant System," a bibliography, detailed subject-matter index, and table of cases. All footnotes to text are grouped together at the end of the book.

The author is a federal judge, on the U.S. Court of Appeals for the Third Circuit. He is one of a very few black ever to be appointed to a federal appellate court. He plans to produce other volumes on the legal history of slavery in the United States.

13. Holt, Pat M., *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention.* Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978. Pp. 48. Cost: $2.25, paperback.

The War Powers Resolution, enacted in 1973, attempts to draw lines between the congressional and presidential war powers. This short pamphlet discusses briefly the history and origins of the resolution, what it is intended to accomplish, and how well it has functioned since its enactment.

The booklet is organized into six chapters. The introductory chapter provides a few paragraphs on the constitutionality of the resolution, and Chapter 2 sets forth the legislative history of the measure. The third chapter, considering whether presidents have complied with the resolution, concludes that compliance has not yet been fully tested. Chapter 4 asks whether the resolution can work in the face of a serious test, and chapter 5 evaluates in mildly pessimistic terms the prospects for improved consultation between the President and Congress in times of crisis. The final chapter concludes that the resolution is intended to make congressional acquiesence in presidential action more difficult, and that the value of this will depend on Congress' willingness to use its many other powers to curb or influence the direction of presidential actions.

The author, Pat M. Holt, was chief of staff of the Senate Foreign Relations Committee from 1974 to 1977. He had been a member of the committee's professional staff since 1950.

The American Enterprise Institute for Public Policy Research was founded in 1943. It describes itself as "a publicly supported, nonpartisan research and educational organization." The purpose of the organization is stated to be "to assist policy makers, scholars, businessmen, the press and the public by providing objective analysis of national and international issues."

For the aid of the reader, the book has a short table of contents. The text of the War Powers Resolution is reproduced in an appendix.

14. Imwinkelried, Edward J., Paul C. Giannelli, Francis A. Gilligan, and Fredric I. Lederer, *Criminal Evidence*. St. Paul, Minnesota: West Publishing Co., 1979. Pp. xix, 408. Paperback.

This text book reviews the current state of the law of evidence of crimes as it is practiced in state and federal courts in the civilian sector of the American bar. The authors take the position, stated in their foreword, that criminal evidence law is evolving in the direction of "a progressive lowering of the barriers to the admission of relevant evidence."

The book is organized into eight parts and twenty-eight chapters. The various parts deal with witnesses, the logical relevance of evi-

dence, its legal relevance, reliability of evidence and privileges affecting evidence, fourth and fifth amendment protections, constitutional protections, and sufficiency of the evidence. Certain of the chapters have been published in different form as articles in the *Military Law Review*.

The chapters are all fairly short, generally about ten pages in length. The heart of the book is the dozen chapters devoted to constitutional topics. These fill almost one-half of the entire book.

For the convenience of the reader, the book offers a summary of its contents, a detailed table of contents, and a subject-matter index. Each chapter is divided into numbered sections and is preceded by an outline. Footnotes are on each page rather than at the ends of chapters.

All four authors are present or former Army judge advocates, and have served on the faculty of The Judge Advocate General's School, Charlottesville, Virginia. Three of the four have each published several articles in the *Military Law Review* on subjects within the area of military justice or civilian criminal law. Edward J. Imwinkelried is a professor of law at the University of San Diego. Paul C. Giannelli, a professor of law at Case Western Reserve University, Cleveland, Ohio, is a captain in the Army Reserve and is a mobilization designee to the Criminal Law Division at the JAG School. Lieutenant Colonel Francis A. Gilligan is a military judge presently stationed at Wiesbaden, Germany. Major Fredric I. Lederer is assigned to the Criminal Law Division, Office of The Judge Advocate General, in the Pentagon, after a year of study as a Hays-Fulbright Scholar in Germany.

15. Jaworski, Leon, with Mickey Herskowitz, *Confession and Avoidance*. Garden City, N.Y.: Anchor Press/Doubleday, 1979. Pp. 326. Cost: $10.95.

This is an autobiography by a famous lawyer, setting forth highlights from fifty years of legal practice. Leon Jaworski is probably best known for his role as an investigator in the Watergate and Korean influence scandals, but he has been involved in many other important cases and activities as well. He gives his observations concerning public figures such as Lyndon Johnson and Richard Nixon, and concerning the major historic events of his time.

Leon Jaworski first came to the United States as an immigrant from Poland early in this century. He became a lawyer in Texas, specializing in trial work. At present he is a senior partner in the Houston law firm of Fulbright and Jaworski. He has held office as president of the American Bar Association and other organizations, and has been recipient of many academic and professional honors.

Mickey Herskowitz is a professional writer, sports columnist, and television commentator in Texas.

The book is organized into eleven chapters covering various episodes or periods of Jaworski's life. It has a table of contents and a detailed subject-matter index.

16. Johnson, Stuart E., with Joseph A. Yager, *The Military Equation in Northeast Asia.* Washington, D.C.: The Brookings Institution, 1979. Pp. xii, 87. Cost: $2.95, paperback.

In this work, the authors examine the development of United States military forces in the area of Northeast Asia. They conclude that shifts in deployments are needed to reflect changes in power relationships over the past quarter century.

China, for example, once a prime enemy, has shown more and more interest in cooperating with the United States. At the same time, South Korea has become a strong and prosperous nation. Soviet naval forces have been increasingly noticable in the area. These and other facts make redeployment necessary, in the authors' view.

The book has four chapters. The first is an introductory essay on the interests, goals, and policies of the United States in northeast Asia. The second chapter contains descriptions of the military forces of the seven countries interested in the area, i.e., the Soviet Union, mainland China, Japan, the Republic of China on Taiwan, the two Koreas, and the United States. Chapter 3, Military Problems, discusses Soviet activities,—the possibility of war in Korea, "the Taiwan problem," and the dangers of proliferation of nuclear weapons in the area. The final chapter sets forth a proposal for an alternative force structure for the United States on the sea and in

Korea and Japan. There is discussion of a variety of political and strategic considerations in this chapter.

Stuart E. Johnson was formerly a Brookings research associate. At the time of publication of the book, he was on the staff of R&D Associates. Joseph A. Yager is a senior fellow in the Brookings Foreign Policy Studies program.

The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally." Its stated purposes are "to aid in the development of sound public policies and to promote public understanding of issues of national importance."

For the convenience of the reader, the book offers a foreword, a table of contents, a glossary of terms and designations, and numerous statistical tables, chiefly in the second chapter.

17. Karsten, Peter, *Soldiers and Society: The Effects of Military Service and War on American Life.* Westport, Conn.: Greenwood Press, Inc., 1978. Pp. 339. Cost: $22.50. Appendix and index.

This work of social history is a review of previous literature on the subject of how military service during America's wars has affected not only those who served, but also their families and their home communities. Literature reviewed includes not only scholarly studies, but also personal recollections, memoirs, and descriptions prepared by a great variety of participants in the nation's wars.

Karsten includes materials prepared by 284 individuals, called "sources," scattered throughout the book. Most of these sources were military personnel who served in World War II, the Vietnam war, or the Korean war, but all wars and all periods of American history from the Revolution onward are represented.

The book is divided into two parts. The first part, "The Consequences of Military Service," contains four chapters reviewing the effects on the individual who serves on active duty. The four chapters are entitled, "The Recruitment Process," "Training," "The Tour of Duty and Combat," and "Homecoming, Adjustment to Civilian Life, and Veteran's Status."

Part II of Karsten's book is called, "The Effects That War and the Military Have on Those Not in the Military Itself." This part also contains four chapters. These are "The GI's Family," "The Economy," "Social and Political Values," and "The 'Enemy Within.' "

The appendix, "Sources Regrouped Chronologically," shows in one page to which war or which period of American history each of the 284 numbered sources belong. This appendix is followed by a three-page subject-matter index.

The author, Peter Karsten, is a professor of history at the University of Pittsburgh. He has published a number of articles and books, including one in 1978 entitled *Law, Soldiers, and Combat.* Professor Karsten is also a consultant to the Hudson Institute.

Soldiers and Society is the first number of the Greenwood Press series, "Grass Roots Perspectives on American History." David Thelan is editor for this series.

18. LeFever, Ernest W., *Nuclear Arms in the Third World.* Washington, D.C.: The Brookings Institution, 1979. Pp. xii, 154. Cost: $9.95, hardcover; $3.95, paperback.

One of the major problems of exporting nuclear technology for generation of electric power is that such technology provides the means of producing nuclear weapons. In this book, the author examines the problem as it is developing in nine nations which have nuclear power generation facilities, and which also have or could have nuclear weapons.

The book is organized into eight chapters. In the introductory chapter, the author states the problem. He discusses the views of several major powers—the Soviet Union, France, and China. He suggests that countries are likely to seek nuclear weapons if they feel insecure.

Chapter 2 discusses nuclear power and its potential for India, and Pakistan's reaction to India's use of nuclear power. The third chapter considers Iran. The book was written before the Shah's overthrow, so this chapter may not be relevant to Iran's present situation and future prospects. Chapter 4 considers Israel and Egypt, but does not mention the accommodation recently achieved by these

two long-time enemies. Chapter 5 shifts our focus to the far east, to South Korea and Taiwan, and chapter 6, to Brazil and Argentina.

The seventh and eight chapters discuss ways and means of deterring countries from acquiring new nuclear weapons, and restraining those countries which already have them. The author feels that the United States can best do this by agreeing with these countries to guarantee their security, so they will not have to develop or expand their own nuclear arms capabilities.

The author, Ernest W. LeFever, was a senior fellow in the Brookings Foreign Policy Studies program. In 1976, he became the founder and first director of the Ethics and Public Policy Center of Georgetown University, Washington, D.C.

The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally." Its purposes are stated to be "to aid in the development of sound public policies and to promote public understanding of issues of national importance."

For the convenience of the reader, the book offers a detailed table of contents and a subject-matter index. Two statistical tables in the introductory chapter set forth information about the military budgets, GNP, present and future military capabilities, and incentives to obtain or expand nuclear arsenals, of several third world countries.

19. Levi, Werner, *Contemporary International Law: A Concise Introduction*. Boulder, Colorado: Westview Press, 1979. Pp. xix, 391. Cost: $22.00, hardcover; $10.00, paperback. Index, bibliography, and two appendices.

In this text, Professor Werner approaches international law as a social phenomenon. He sees it as a necessary and inevitable consequence of the development of international society from a collection of more or less self-sufficient nation states, to an aggregate of states which are increasingly interdependent upon each other. This interdependence is seen to be deepening, despite the widely diverging views of states—Third World, Fourth World—on the nature and purposes of international law.

The material of the book is organized into ten parts and twenty-six chapters. The first part, "The Nature and Function of International Law," is definitional. Its five chapters review the history and origins of international law, differing theories concerning what is international law, its relationship with other types of law, and the various methods or routes by which principles come to be recognized as part of international law.

Parts 2 and 3 deal, respectively, with legal capacity of entities in international law, and the legal qualities or characteristics, such as sovereignty, of the states and international organizations which are the subjects of international law.

Part 4 deals with the jurisdiction of states. Covered are temporal, spatial, personal, and material jurisdiction. This is followed by Part 5, containing two chapters on persons in international law. The sixth part discusses international actions which have legal consequences, including unilateral transactions, multilateral actions or treaties, and the doctrine of state responsibility.

The very short seventh part discusses international cooperation in the political and economic arenas. The current range of methods for pacific settlement of international disputes is the subject of Part 8. The methods are divided into those involving and those not involving decisions by third parties. Part 9 presents a brief overview of the use of force, its legal basis and regulation, and the position of neutral third states. The book closes with Part 10, a short essay entitled "The Dynamic Character of International Law."

Levi's book is a textbook, and each of the first nine parts is followed by a list of references and readings, in the form of a bibliography organized under subject matter or topic headings. Other aids for the reader include a detailed table of contents, a one-page table of abbreviations used in the book, an appendix setting forth digests of eight important cases in international law, a table of cases cited, listed alphabetically by case name, a selected bibliography, and a subject-matter index.

The author is a professor emeritus at the University of Hawaii at Manoa, and has written extensively on international law and politics.

20. Levie, Howard S., *Prisoners of War in International Armed Conflict, Volume 59 of the International Law Studies.* Newport, R.I.: U.S. Naval War College, 1978. Pp. lxix, 529.

This book provides a comprehensive treatment of the law governing the status, employment, protection, and punishment of prisoners of war. It is current up through 1977, the year in which work was completed on the two new Protocols to the Geneva Conventions of 1949 dealing with prisoners of war and the wounded and sick.

The book is organized into seven chapters. The first of these deals primarily with entitlement of individuals to prisoner-of-war status; the second, with the conditions of their imprisonment; and the third, with employment of prisoners by their captors. Chapter IV discusses the concept of the protecting power, and the roles of the prisoners' representative and the International Committee of the Red Cross. The fifth chapter covers punishment of prisoners, and the sixth, punishment of those who mistreat prisoners. The last chapter reviews the various means of terminating captivity of prisoners of war.

The substantive chapters are followed by two appendices. Appendix A contains the text of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and its annexes. Appendix B is a list of all the states parties to that convention. Other aids for the reader include a detailed table of contents, and tables of abbreviations and of materials cited, including articles, books, statutes, treaties, cases, and related documents. The book closes with a subject-matter index.

This book is volume 59 of the Naval War College International Law Series. That series, informally called the "Blue Book" series, began in the 1890's with the publication of various lectures on international law delivered at the College. The series was terminated in the mid-1960's, and has been resumed with this volume.

The author, Professor Howard S. Levie of the Saint Louis University School of Law, is a retired Army JAGC colonel. Among his many published writings is an article, *The Employment of Prisoners of War*, 23 Mil. L. Rev. 41 (1964). He held the Naval War College Stockton Chair of International Law during the academic year 1968–69.

21. Lewis, John R., *Uncertain Judgment: A Bibliography of War Crimes Trials*. Santa Barbara, California: American Bibliographical Center-Clio Press, 1979. Pp. xxxiii, 251. Cost: $25.75.

This work is a list of 3,352 books and articles dealing directly or indirectly with war crimes. Most of the listed writings were published during the twentieth century, especially during and since World War II, but some are older. Most are in the English language, but several other major languages are represented, including German, French, Italian, Japanese, Spanish, and Russian.

The publications are listed alphabetically under perhaps two hundred topic and subtopic headings. The book is organized in four major parts.

Part I, "General Reference," lists on five pages a number of writings identified as "basic reference guides," also bibliographies and other types of guides and indices.

The second part, "Background Issues," is considerably larger. It lists writings on the laws and rules of war, and on the theory and philosophy of war crimes. Most of Part II lists publications dealing with the various international conferences, conventions, and treaties setting forth the law of war and war crimes. A couple of dozen treaties are listed, beginning with the Geneva Convention of 1864. For some of the more important treaties, listed works are divided into works containing or dealing with the documents of the treaties, and works dealing with given treaties in more general terms.

The heart of the book is the third part, which lists approximately two thousand historical works. There are sections listing writings dealing with war crimes before 1914; with World War I; and with the Vietnam War and other post-World War II events, including the trial of mercenaries in Angola in 1976. However, almost all of Part III consists of an exhaustive bibliography of the trials growing out of World War II.

Major subsections in this area include allied conferences and declarations prior to the end of the war; the activities of the International Military Tribunal, Nuremberg, 1945–46; the United States

Military Tribunals at Nuremberg; other allies proceedings and national trials; and the International Military Tribunal, Far East.

Part IV, Subsidiary Issues, is a catchall section dealing with such matters as trial procedures, various defense arguments, psychological aspects of war crimes, the concept of aggressive war in international law, "the problem of the military," treatment and mistreatment of various categories of prisoners, collaboration, extraditions, occupation government, clemency, and statutes of limitations on war crimes.

The author, John R. Lewis, is an associate professor of history at the University of Southern California. The book is No. 8 in the War/Peace Bibliography Series, which has been developed by the publisher in cooperation with the Center for Study of Armanent and Disarmament at the California State University, Los Angeles. The general editor for the series is Richard Dean Burns. The Center was organized in the early 1960's to collect and catalogue materials dealing with the issues of war and peace, and to aid scholars and interested members of the public in studying these issues.

For the use of the reader, the book offers a detailed table of contents, a chronology of events tending toward the development of the law of war, an introduction, a short list of abbreviations, and an index of authors by name and entry number.

22. Nitze, Paul H., Leonard Sullivan, Jr., and the Atlantic Council Working Group on Securing the Seas, *Securing the Seas: The Soviet Naval Challenge and Western Alliance Options.* Boulder, Colorado: Westview Press, Inc., 1979. Pp. xxxi, 464. Cost: $24.00, hardcover; $12.00, paperback.

Seapower continues to be an important element of national power for modern states in general and for the United States and the Soviet Union in particular. This book reviews the past evaluation and current status of both Soviet and United States naval power, and presents recommendations for United States naval policy in the years to come.

The book is organized into sixteen chapters. The introductory chapter provides an overview of new factors, such as nuclear

weaponry, which have affected the use of the seas in the past few decades; the future importance of the seas; and the continued importance of naval superiority. The objectives, limitations, and outline of this study are set forth.

The second, third, and fourth chapters describe the evaluation of Soviet naval power, the present status of the Soviet fleet, and the allocation of naval forces. This is followed by a comparative chapter discussing western maritime interests. Chapter 6 then sets forth the authors' views concerning the implications of Soviet maritime capabilities.

The seventh and eighth chapters discuss the history of United States naval power and the allocation of United States and allied naval forces. The authors make frequent use of the term "Western Alliance," in referring to the naval forces of the United States and its presumed allies. These chapters are followed by another comparative chapter, matching Soviet naval capabilities against those of the Western Alliance. Chapter 10 continues this comparison.

The eleventh, twelfth, and thirteenth chapters discuss the probable future technological and force requirements of the Western Alliance, constraints on the United States budget for naval procurement, and what is needed to defend our sea lanes in the future.

The fourteenth chapter provides the author's overall assessment of the current naval and maritime balance between the United States and the Soviet Union. The fifteenth chapter sets forth the authors' findings and recommendations for formulation of policies committing the Western Alliance to long-range naval superiority and to investment in more effective naval weaponry. The sixteenth chapter briefly sets forth some additional views expressed by various members of the study group, in the nature of partial dissents.

Paul H. Nitze has served as Secretary of the Navy and as Deputy Secretary of Defense. Leonard Sullivan, Jr., was Principal Deputy Director of Defense Research and Engineering, and as Assistant Secretary of Defense for Program Analysis and Evaluation. The Atlantic Council Working Group on Securing the Seas is a group of scholars, present and former government employees, and experts knowledgeable of the problems of naval power. Paul H. Nitze served as chairman of the group, and Leonard Sullivan Jr., was

project director and rapporteur. The group is sponsored by the Atlantic Council of the United States, a private organization interested in promoting study of questions of United States policy affecting the Atlantic Ocean. The study on securing the seas was funded by a grant from the Scaife Family Charitable Trusts.

For the use of the reader, the book offers a detailed table of contents, lists of the dozens of tables, figures, and pictures used in the book, a foreward and preface, a list of the membership of the Working Group on Securing the Seas, a summary of policy conclusions and recommendations, and an appendix on Soviet ship characteristics. The footnotes are grouped together at the end of the book.

23. Schwartz, Victor E., *Comparative Negligence*. Indianapolis, Indiana: The Allen Smith Co., 1974. Pp. xi, 434. Supplement, 1978. Pp. xi, 193. Cost for both: $35.00.

This work was originally published in 1974. At that time, according to the publishers' note, twenty-six states and Puerto Rico recognized comparative negligence as part of their tort law (p. iv.). The book is updated by pocket parts, to be inserted inside the back cover; the 1978 Supplement notes that by 1977, the number of states recognizing comparative negligence had risen to thirty-two. Thus, a text on the subject clearly can be relevant to the law student and practitioner.

Comparative negligence has thus come to replace contributory negligence. This means that whereas formerly a plaintiff in a tort case would be denied recovery if he was even partly at fault, now he can expect to obtain at least partial recovery in most American jurisdictions. This shift in the law parallels the growth of the use of no-fault insurance programs for settlement of minor automobile accident claims.

The book contains twenty-one chapters and three appendices. The 1978 Supplement contains updating comments concerning each of the chapters and appendices. The text is divided into numbered sections, chapter by chapter.

The first three chapters provide a general overview of the doctrine of comparative negligence, its history, impact, and present

status in American law. There follows a number of chapters, each dealing with some aspect of negligence theory, such as causation, last clear chance, assumption of risk, nuisance, strict liability, and wrongful death. Other topics are covered as well. The concluding chapters deal with procedural questions and strategic considerations.

The three appendices set forth summaries and textual quotations of the comparative negligence statutes used in the various states. A bibliography and a subject-matter index complete the volume. The 1978 Supplement is identical in organization with the basic volume.

The author, Victor E. Schwartz, is a professor of law at the College of Law of the University of Cincinnati. He was acting dean of the College of Law when the basic volume was published in 1974.

24. Seidel, Arthur H., *What the General Practitioner Should Know About Trademarks and Copyrights.* Philadelphia, PA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 1979. Fourth edition. Pp. xiv, 265. Paperback.

This ALI-ABA continuing legal education textbook has been updated to take account of the general revision of Title 17 of the United States Code, which became effective on 1 January 1978. That title deals with copyrights. New developments in trademark law have also been incorporated into this edition.

The book is organized into eleven chapters. The opening chapter provides a general introduction to trademark and copyright law. Chapters 2 through 10 deal with various aspects of trademark law. The long final chapter summarizes copyright law.

Thus, the heart of the book is its extensive discussion of trademark law. Chapter 2 discusses trademark statutes, federal and state, past and present, and trademark registration. The third chapter briefly considers selection of trademarks, and Chapter 4 examines the trademark search system. The next five chapters review the various types of proceedings associated with trademark applications, including opposition, cancellation, interference, and

concurrent registration proceedings. Chapter 9 discusses trademark litigation in court, and the tenth chapter reviews transfer of trademark rights by assignment and license.

The author, Arthur H. Seidel, is a patent attorney and a member of the Pennsylvania, New York, and District of Columbia bars. His first edition of this book was published by ALI-ABA in 1959. He has published other works on patent law and trade secrets.

For the use of the reader, the book offers a foreward, a table of contents, tables of cases, statutes, and rules cited in the text, and a subject-matter index. Four appendices are included. Appendix A reproduces forms used in trademark applications. The second appendix sets forth the classification of goods and services under the Trademark Act used by the United States Patent Office. Appendix C shows examples of a typical trademark registration file. The fourth appendix contains sample forms used in copyright registration.

25. Stockholm International Peace Research Institute, *Statement on World Armaments and Disarmament.* Stockholm, Sweden: SIPRI, 1978. Pp. 46.

This booklet contains a statement summarizing the views of SIPRI on world armaments and disarmament. The statement was delivered by Dr. Barnaby, the director of SIPRI, before the United Nations General Assembly Special Session Devoted to Disarmament on 13 June 1978. The entire statement is less than four printed pages in length.

A two-paragraph introduction explains what SIPRI is and what are its policies and activities. A longer section, the heart of the statement, entitled "Global militarization," discusses the steadily increasing investment of the world's nations in weaponry and in military manpower. It takes as a temporal starting point the conclusion of the Partial Test Ban Treaty in 1963. The statement points out, among other things, that, since that year, world military expenditures have increased by about 40 percent, while the world's armed forces have increased by nearly 30 percent. Nuclear armaments, military satellites, nuclear-powered submarines, and other devices have all increased in number and technical sophistication.

The concluding section of the statement recommends that an "integrated approach" be taken to disarmament henceforward. Instead of treaties focusing piecemeal on isolated weapons or methods of warfare, large, comprehensive agreements should be developed, covering a wide variety of "quantitative reductions and qualitative restrictions to be carried out simultaneously."

The original statement is in English. This is followed by translations into French, Spanish, Russian, Arabic, and Swedish. The booklet concludes with an appendix containing nine tables and six figures, or graphs, comparing United States and Soviet weaponry, and providing information about Third World arms expenditures.

26. Zellick, Graham, *European Human Rights Reports*. London: European Law Center Ltd., 1979. Pp. viii, 188.

The European Court of Human Rights began deciding cases in 1960. Although the court's decisions have often attracted worldwide attention, there has never been a formal system for reporting the cases decided such as we are accustomed to in the United States. The editors of this new publication propose to fill this need.

This paperbound book is in two parts, designated volumes 1 and 2. Later issues will be similarly divided, until all cases between 1960 and 1978 are reported. Volume 1 begins with the first case decided in 1960, and will move forward in time. Volume 2 reports two cases in 1978, and will move backward in time. When they finally meet, and there are no more unreported past decisions, volumes 1 and 2 will be completed.

The portion of volume 1 which appears in this book contains three decisions in the case of *Lawless v. Ireland*. One G. R. Lawless complained that the government of the Republic of Ireland improperly detained him without trial for several months in 1957. Two of the three decisions dealt with procedural matters. The decision on the merits, issued in 1961, upheld the government's action in the face of extensive terrorist activity in Northern Ireland.

The second volume reports two 1978 decisions, both involving complaints against the government of the United Kingdom. *Tyrer v. United Kingdom* is the famous birching case, in which a schoolboy complained that the practice of punishing a student with a stick or

whip violates provisions of the European Convention on Human Rights. The other case, *Republic of Ireland v. United Kingdom*, involved a complaint that British methods of interrogating suspected terrorists amounted to torture.

In both cases, the United Kingdom attempted to moot the issue by changing its practices. However, in both cases the court issued decisions anyway. The court decided that birching is degrading punishment, and is prohibited; and that the police interrogation practices constituted inhuman treatment, without rising to the level of torture.

The editor of the *Reports*, Graham Zellick, is a reader in law, or lecturer, at the University of London. He is assisted by a group of barristers who serve as editorial directors.

The *Reports* have extensive headnotes, a table of contents, and a cumulative index by subject and by convention provision and article cited. The editor recommends that the reports be cited 1 and 2 E.H.R.R. (page), but Eur. Hum. Rights Rep. seems a more useful citation form.

27. Zillman, Donald N., Albert P. Blaustein, Edward F. Sherman, Duane L. Faw, Murl A. Larkin, Joe H. Munster, Jr., Jordan J. Paust, Robert D. Peckham, and Albert S. Rakas, *The Military in American Society*. New York: Matthew Bender & Company, Inc., 1978. Pp. xviii, 839.

This work is a basic textbook containing cases and materials on military law for use in law schools. It is written for students with varying amounts of prior legal training, and it assumes no military experience on the part of its readers.

The book is organized into six large chapters covering various aspects of military law. Each of the chapters is separately paginated and is divided into numbered sections and subsections. The book is contained in a looseleaf binder.

The opening chapter is called, "The American Military Establishment—Powers and Control." This chapter opens with a short overview of the scope of the federal government's power to estab-

lish and maintain a military organization. The heart of the chapter is a discussion of military power over civilians. Covered are such topics as response to threats from foreign governments and from internal disorders, military involvement in ordinary police actions, and various nonemergency uses of national security powers. The chapter closes with a section on the allocation of powers of control among the various branches of the government.

Chapter II deals with one of the major topics of military administrative law, entry into the military service. Included is discussion of enlistments, officer appointments, and activation of reservists. The largest section of the chapter concerns the draft, and covers such subtopics as deferments, exemptions, conscientious objection, and administrative procedures of the selective service system and judicial review thereof.

The third chapter, much the largest chapter in the book, deals with the military justice system. After a short introductory note on some points of military judicial history, the chapter opens with a discussion of jurisdiction of courts-martial. This is followed by a long section on investigations and pretrial procedures. Covered in this section are such topics as interrogation of suspects, rights warnings, searches and seizures, pretrial confinement, the speedy trial requirement, command influence, and the right to counsel. A section on trial procedure discusses the Article 39(a) session, trial by judge alone, charges, rules of evidence, and arguments and instructions to a court-martial with members. Other sections cover the various types of crimes which are peculiar to military service and which have no civilian analogs; punishments; the military appellate process; review of military judicial actions by civilian courts; and nonjudicial punishment under Article 15.

Chapter IV covers a variety of administrative law topics under the title, "Individual Rights and the Needs of the Military." Included are sections on publications and censorship, complaints to higher authorities, contemptuous words, disloyal statements, first amendment activities on military installations, restrictions on appearance of military personnel, sex-related issues in the nature of discrimination, religion, racial problems, and rights of association, with emphasis on unionization.

The fifth chapter also concentrates on administrative law topics, under the heading, "Termination of Military Membership." This chapter deals with the various types of administrative discharges, the grounds for their issuance, and the procedures applicable. The chapter also covers review of discharge proceedings, especially judicial review in civilian courts.

The closing chapter, entitled "The Law of Armed Conflict," deals with the law of war, including sources of that law, when it applies, and what are the general prohibitions and protections of the law. A long section covers criminal responsibility, jurisdiction over violations of the law of war, enforcement of the law, and the limits of individual responsibility under the law of war.

The nine authors of the book are all professors at civilian law schools, and each of them has had active service as a judge advocate in one of the military services.

Donald N. Zillman, author of Chapter II, "Entry Into the Military," is a professor at the Arizona State University Law School. During his service as an Army judge advocate he was editor of the *Military Law Review*, and wrote and published therein a number of articles and recent development notes.

Albert P. Blaustein is a professor at the Rutgers University Law School. A former Army judge advocate, he published an article on African military law at 32 Mil. L. Rev. 43 (1966). He is one of the three authors responsible for chapter VI on the law of armed conflict.

Edward F. Sherman, professor at the University of Texas Law School, is one of two authors of the first chapter, and is the sole author of chapter IV. A former Army judge advocate, he has published an article on judicial review of military determinations and exhaustion of remedies, at 48 Mil. L. Rev. 91 (1970).

Duane L. Faw, a professor at the Pepperdine Law School, is a former marine brigadier general and is one of the three authors of the sixth chapter, on the law of armed conflict.

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professor at Hastings College of Law. They are the authors of the third chapter, on the military justice system, and have recently published a textbook on military evidence. Both formerly served as judge advocates in the Navy.

Jordan J. Paust, former Army judge advocate, is one of the three authors of chapter VI on the law of armed conflict. He is a professor at the University of Houston Law School, and has published two articles on law-of-war topics at 57 Mil. L. Rev. 99 (1972), and at 64 Mil. L. Rev. 1 (1974).

Robert D. Peckham is a professor at the University of Georgia Law School, and one of the two authors of the first chapter. He is a former Army judge advocate.

Albert S. Rakas is a retired Army JAGC colonel and is a professor at the University of Akron Law School. He is the author of the fifth chapter, on termination of military membership.

For the assistance of readers, the book has a summary of contents, a detailed table of contents, a subject-matter index, and a table of the cases cited in the text. Appendix A reproduces the Uniform Code of Military Justice, and Appendix B is a glossary of military terms.

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I. INTRODUCTION

This index follows the format of the vicennial cumulative index which was published as volume 81 of the *Military Law Review*. That index was continued in volume 82. Future volumes will contain similar one-volume indices. From time to time the material of volume indices will be collected together in cumulative indices covering several volumes.

The purpose of these one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the vicennial cumulative index, and discover what else has been published under the same headings. One area of imperfection in the vicennial cumulative index is that some of the indexed writings are not listed under as many different headings as they should be. To avoid this problem it would have been necessary to read every one of the approximately four hundred writings indexed therein. This was a practical impossibility. However, it presents no difficulty as regards new articles, indexed a few at a time as they are published.

Second, new subject-matter headings are easily added, volume by volume, as the need for them arises. An additional area of imperfection in the vicennial cumulative index is that there should be more headings.

Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in other cumulative indices in the future. This will save much time and effort in the long term.

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B. BOOK TITLES AND REVIEW TITLES

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